Supreme Court, U.S.
FILED

No. ___ 95-81 JUL 10 1995

In the

Supreme Court of the United States

OFFICE OF THE CLERK

October Term, 1995

SHANNON RICHEY FAULKNER, individually and on behalf of all others similarly situated,

Petitioner,

and

UNITED STATES OF AMERICA,

Respondent,

v.

JAMES E. JONES, JR., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

VALORIE K. VOJDIK
Counsel of Record
New York University School of Law
137 MacDougal Street
New York, New York 10012
(212) 998-6550

SARA L. MANDELBAUM
STEVEN R. SHAPIRO
JANET GALLAGHER
American Civil Liberties
Union Foundation
Women's Rights Project
132 West 43rd Street
New York, New York 10036
(212) 944-9800, Ext. 521

HENRY WEISBURG
THOMAS F. SWIFT
MARY K. WARREN
VANESSA BEEVER
Shearman & Sterling
153 East 53rd Street
New York, New York 10022
(212) 848-4000

ROBERT R. BLACK
23 Broad Street
P.O. Box 643
Charleston, South Carolina 29402
(803) 577-5806

SUZANNE E. COE
Silver & Coe
P.O. Box 431
Greenville, South Carolina 29602
(803) 370-9086

QUESTION PRESENTED

Whether the Constitution permits a state to remedy the unconstitutional and invidious exclusion of women from a unique military-style state college by creating a separate and intentionally unequal program for women, which has the effect of reserving to males and denying to females access to a school distinguished by its superior resources, prestige and extensive alumni network.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following were parties in the Courts below: Carroll A. Campbell, Jr., Governor of the State of South Carolina; T. Eston Marchant, Adjutant General of the State of South Carolina; Barbara S. Nielsen, Superintendent of Education of the State of South Carolina; William F. Prioleau, Jr.; William E. Jenkinson III; Leonard F. Fulghum, Jr.; James M. Leland, Jr.; John A. McAllister, Jr.; David S. Boyd, Jr.; Julian G. Frasier III; James W. Bradin; Larry J. Ferguson; Steven D. Peper, Members of The Board of Visitors of The Citadel, the Military College of South Carolina; Wallace I. West, Jr., Director of Admissions and Recruiting at The Citadel, the Military College of South Carolina; Claudius E. Watts III, President of The Citadel, the Military College of South Carolina, in their official capacities; The State of South Carolina; The Citadel, the Military College of South Carolina, and The Board of Visitors of The Citadel, the Military College of South Carolina.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

APPENDICES iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 3

A. Nature of the Case 3
B. Petitioner Shannon Faulkner 3
C. The Unique Military-Style Education of The Citadel's Corps of Cadets 4
D. The District Court's Decision 5
E. The Court of Appeals' Decision in *Faulkner II* 8
F. Six Active Judges on the Court of Appeals Voted in Favor of Rehearing *VMI II* En Banc 10
G. South Carolina's Remedial Proposal 11
H. Supreme Court Review in *VMI II* and *Faulkner II* 12

REASONS FOR GRANTING THE WRIT 12

I. THIS CASE RAISES ISSUES OF EXCEPTIONAL IMPORTANCE REGARDING STATE-SPONSORED GENDER DISCRIMINATION 12

A. The Decision Below Rests on Outmoded Stereotypes About Women that this Court has Rejected as a Basis for Gender-Based Classifications. 14

Page

B. The Fourth Circuit's "Special Intermediate Scrutiny" Test Effectively Eliminates Heightened Scrutiny in Gender Discrimination Cases 16

C. The Decision Below Provides Women with Even Less Legal Protection Than the Discredited Doctrine of "Separate But Equal" 18

II THIS CASE OFFERS THE COURT AN OPPORTUNITY TO ANSWER THE UNRESOLVED QUESTION OF WHETHER STRICT SCRUTINY APPLIES TO GENDER CLASSIFICATIONS 20

III THIS COURT'S CONSIDERATION OF THESE CONSTITUTIONAL ISSUES WOULD BE ENHANCED IF THE COURT HAD AN OPPORTUNITY TO REVIEW THE RECORD AND ARGUMENTS IN BOTH THIS CASE AND *VMI* 25

CONCLUSION 27

APPENDICES

APPENDIX A: Opinion of the United States Court of Appeals for the Fourth Circuit, dated April 13, 1995 ..... 1a-32a

APPENDIX B: Findings of Fact, Conclusions of Law and Order of the United States District Court, dated July 22, 1994 ..... 33a-66a

APPENDIX C: Order of the United States District Court, dated August 5, 1994 ..... 67a-68a

APPENDIX D: Order of the United States District Court, dated August 17, 1993 ..... 69a

		Page
APPENDIX E:	Opinion of the United States Court of Appeals for the Fourth Circuit, dated November 17, 1993	70a-100a
APPENDIX F:	Memorandum Decision of the Supreme Court of the United States, dated January 18, 1994	101a
APPENDIX G:	Order of the United States Court of Appeals for the Fourth Circuit, August 12, 1994	102a-103a

TABLE OF AUTHORITIES

Page(s)

CONSTITUTIONAL PROVISION AND STATUTES

U.S. Constitution, Amendment XIV ..... passim
42 U.S.C. § 1983 2
28 U.S.C. § 1254 (1) 2
S.C. Code Ann. § 59-104-610 (4) 6, 26

CASES

Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) 13, 24
Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) 19
Batson v. Kentucky, 476 U.S. 79 (1986) 21
Brown v. Bd. of Educ., 347 U.S. 483 (1954) ..... passim
City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 21, 23
City of Richmond v. J.A. Croson, Co., 488 U.S. 469 (1989) 23
Conlin v. Blanchard, 890 F.2d 811 (6th Cir. 1989), *aff'd*, 947 F.2d 944 (6th Cir. 1991) (per curiam) 24
Connecticut v. Teal, 457 U.S. 440 (1982) 18
Coral Constr. Co. v. King County, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992) 24
Craig v. Boren, 429 U.S. 190 (1976) 15, 23
Estelle v. Gamble, 429 U.S. 97 (1976) 12
Faulkner v. Jones, 114 S. Ct. 872 (1994) 2
Faulkner v. Jones, 51 F.3d 440 (4th Cir.1995) ..... passim
Faulkner v. Jones, 10 F.3d 226 (4th Cir.1993) 2
Faulkner v. Jones, 858 F. Supp. 552 (D.S.C. 1994) ..... passim

Cases (continued) Page(s)

Florida ex rel. Hawkins v. Board of Control, 350 U.S. 413 (1956) 19-20
Frontiero v. Richardson, 411 U.S. 677 (1974) 21, 22, 24
Harris v. Forklift Sys., 114 S. Ct. 367 (1993) 21
J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994) ..... passim
Land v. Dollar, 330 U.S. 731 (1947) 12
Mathews v. Lucas, 427 U.S. 495 (1976) 22
McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950) 19
Mississippi v. Hall, 187 So. 2d 861 (Miss.), *appeal dismissed*, 385 U.S. 98 (1966) 15
Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) ..... passim
Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) 13
Muller v. Oregon, 208 U.S. 412 (1908) 15
Plessy v. Ferguson, 163 U.S. 537 (1896) 13, 19
Reed v. Reed, 404 U.S. 71 (1971) 16
Sipuel v. Board of Regents, 332 U.S. 631 (1948) 20
Stanton v. Stanton, 421 U.S. 7 (1975) 21
Sweatt v. Painter, 339 U.S. 629 (1950) 19, 20
United States v. Commonwealth of Virginia, 52 F.3d 90 (4th Cir. 1995) 11, 19
United States v. Commonwealth of Virginia, 44 F.3d 1229 (4th Cir. 1995) ..... passim
United States v. Commonwealth of Virginia, 976 F.2d 890 (4th Cir. 1992) *cert. denied*, 113 S. Ct. 2431 (1993) ..... passim
United States v. Commonwealth of Virginia, 852 F. Supp. 471 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995) 19
United States v. Fordice, 112 S. Ct. 2727 (1992) 18
Weinburger v. Wiesenfeld, 420 U.S. 636 (1975) 14

Page(s)

OTHER AUTHORITIES

T. Aleinkoff, *A Case For Race Conciousness*, 91 Colum. L. Rev. 1060 (1991) 24
S. Oliver, Jr., *A Survey of Post-Croson Devs.*, 38 Loyola L. Rev. 7 (1992) 24

No. ___

In the

Supreme Court of the United States

October Term, 1995

SHANNON RICHEY FAULKNER, individually and on behalf of all others similarly situated,

Petitioner,

and

UNITED STATES OF AMERICA,

Respondent,

v.

JAMES E. JONES, JR., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Shannon Richey Faulkner asks that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit, entered on April 13, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 51 F.3d 440 (4th Cir. 1995) ("*Faulkner II*") and is annexed to this petition as Appendix A. The opinion of the United States District Court for the District of South Carolina is reported at 858 F. Supp. 552 (D.S.C. 1994) ("*Faulkner I*") and is annexed as Appendix B. The judgment of the District Court specifying the terms of Ms. Faulkner's admission to The Citadel, dated August 5, 1994, is unreported and annexed as Appendix C.

The order of the District Court, dated August 17, 1993, granting Ms. Faulkner's motion for a preliminary injunction, is unreported and is annexed as Appendix D. The earlier opinion of the Court of Appeals, dated November 17, 1993, affirming the District Court's granting of the injunction is reported at 10 F.3d 226 (4th Cir. 1993) and is annexed as Appendix E. The memorandum decision of this Court, dated January 18, 1994, reported at 114 S. Ct. 872 (1994), denying respondents' application for a stay pending the filing of a petition for certiorari is annexed as Appendix F. Appendix G is an unreported order of the Court of Appeals, dated August 12, 1994, granting respondents' application for a stay of the District Court's order granting Ms. Faulkner immediate admission to The Citadel's Corps of Cadets.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1995. Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. *Nature of the Case*

Shannon Richey Faulkner commenced this action under 42 U.S.C. section 1983 on March 2, 1993 in the United States District Court for the District of South Carolina, on behalf of herself and all others similarly situated, asserting that The Citadel's males-only admission policy violates the Equal Pro-

tection Clause of the Fourteenth Amendment of the United States Constitution. She seeks a permanent injunction compelling her admission to The Citadel's Corps of Cadets. In June 1993, the District Court granted the motion of the United States of America to intervene as a party-plaintiff.

B. *Petitioner Shannon Faulkner*

Ms. Faulkner is a twenty year old female resident of South Carolina. She was an honors student and 1993 graduate of Wren High School in Easley, South Carolina, where she participated in various academic and extracurricular activities, including a national academic honor society, varsity basketball and softball, marching band, and high school yearbook. Ms. Faulkner applied for admission to The Citadel, the Military College of South Carolina in January 1993. The Citadel is a military-style college and an agency of the State of South Carolina. The Citadel notified Ms. Faulkner by letter on January 22, 1993 that she had been provisionally accepted into the Corps of Cadets. On February 10, 1993, The Citadel revoked her provisional acceptance and rejected her application, based upon its discovery that she was a female. (The Citadel's application form did not call for disclosure of the applicant's sex.)

Ms. Faulkner has been attending classes as a non-cadet at The Citadel since January 1994, pursuant to a preliminary injunction.[1] However, she has not been admitted to the Corps of Cadets itself. Ms. Faulkner does not seek a sex-segregated education, but rather the rigorous and disciplined education of the Citadel's Corps of Cadets military-style program.

---

[1] On August 17, 1993, the District Court granted Ms. Faulkner's motion for a preliminary injunction permitting her to attend day classes at The Citadel during the pendency of this case, which the Fourth Circuit affirmed on November 17, 1993. (Apps. D & E). Chief Justice Rehnquist denied defendants' application for a stay pending the filing of a petition for certiorari on January 18, 1994. (App. F).

C. *The Unique Military-Style Education of The Citadel's Corps of Cadets*

The Citadel is a public military-style college which for 153 years has excluded women. *Faulkner I*, 858 F. Supp. at 556, (App. 38a). It is the only public institution of higher education in South Carolina that offers a military-style education; it is also the only public institution that is sex-segregated. *Id.*, (App. 38a). As the president of The Citadel testified at trial, The Citadel offers a regimented military structure and "no other institution in South Carolina offers an equivalent experience." Supplement to Joint Appendix in Fourth Circuit ("JA Supp."), Exh. K at 92-97; 99-100. The Citadel offers its male students the invaluable benefits of its prestige, access to a powerful and influential alumni network, a rich endowment and other resources that are unparalleled in South Carolina. *See Faulkner II*, 51 F.3d at 450-51 (Hall, concurring), (App. 20a). The accomplishments and prestige of its alumni make The Citadel attractive to women as well as men.[2]

The Citadel admits that women could perform just as well as male cadets and would benefit tremendously from its rigorous military-style program. Joint Appendix in the Fourth Circuit ("JA"), 237-238; JA 739. Unlike The Virginia Military Institute ("VMI"), The Citadel and its expert witnesses concede that The Citadel would still be able to fulfill its mission of creating citizen-soldiers if women were admitted.

---

[2] For example, The Citadel's alumni include a sitting United States senator, former governors of South Carolina, a United States ambassador, two sitting federal court judges, a sitting justice on the South Carolina Supreme Court, and the current president of the University of South Carolina, as well as numerous state legislators and prominent business leaders. JA Supp. Exh. K at 103; JA Supp. Exh. T; JA Supp. Exh. F at 11; JA 445-46.

D. *The District Court's Decision*

After the filing by Ms. Faulkner of a motion for summary judgment, the District Court ordered a trial on the issues of liability and remedy. Given the Fourth Circuit's decision in *United States v. Commonwealth of Virginia*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993) ("*VMI I*"), the court limited the issues to be tried to (1) whether defendants could articulate any fact or argument that distinguished this case from the decision in *VMI I*; and (2) if liability were found, the appropriate remedy for the violation of the rights of Ms. Faulkner and other similarly situated women. The District Court also ordered the defendants to file a proposed remedial plan prior to trial. Ms. Faulkner and the District Court accepted the findings and conclusions of *VMI I* as binding *solely* for the purposes of determining unresolved factual issues raised by Ms. Faulkner's motion for summary judgment. The District Court specifically reserved Petitioner's right to challenge at a future trial the alleged value of single-sex education, the asserted pedagogical value of The Citadel, or any other issue that distinguishes The Citadel from VMI. *Faulkner I*, 858 F. Supp. at 555 n.5, (App. 36a).

Following a two-week hearing, the District Court issued an opinion on July 22, 1994 holding that The Citadel's males-only admission policy violates the right of Ms. Faulkner and other women to equal protection under the law as guaranteed by the Fourteenth Amendment. The court found that "[t]he type of education available at The Citadel is not available at any other institution in South Carolina." *Faulkner I*, 858 F. Supp. at 556, (App. 38a). Specifically, it found that:

> [t]he unique feature of The Citadel is the requirement that all undergraduate day students be members of the South Carolina Corps of Cadets, subject to military discipline at all times, and enrolled in programs of study which qualify graduates for commissions in the active or reserve armed forces.

Id. It further found that The Citadel is the only public institution in South Carolina which offers single-gender education. *Id.*

The District Court also found that it is a goal of South Carolina to assure "the full participation of all citizens in higher education on an equitable basis." *Faulkner I*, 858 F. Supp. at 558, (App. 42a). South Carolina by statute must "assure the maintenance and continued provision of access to and equality of educational opportunity in higher education in South Carolina." S.C. Code Ann. §§ 59-104-610(4). The Commissioner of Higher Education conceded at trial that the exclusion of women from The Citadel violates the state policy of providing equal educational opportunities for women. JA 594.

The court expressly rejected defendants' argument that the exclusion of women from The Citadel was justified by a state policy favoring single-sex education, where sufficient demand existed, as part of a diverse educational system. Despite defendants request, the District Court made no finding that South Carolina had a policy of providing single-sex education; instead, the court found that each of the formerly single-sex colleges in the state has become coeducational, except for The Citadel. The District Court also rejected South Carolina's argument that the absence of a Citadel education for women was justified by the alleged lack of demand among women for an all-female Citadel program. Even if demand were somehow relevant, the District Court found that between twenty and fifty women would join the Corps of Cadets each year if women were admitted to The Citadel, and that defendants had not offered any evidence as to the number of women interested in attending a single-sex college. *Faulkner I*, 858 F. Supp. at 560, (App. 46a-47a). Moreover, the District Court noted that this Court "continues to clearly proclaim that those rights created by the Equal Protection Clause of the Fourteenth Amendment are personal, individual rights" that cannot be denied based upon the number of other persons who seek access to a state benefit. *Id.* at 565, (App. 57a).

Turning to remedy, the District Court found that the only available remedy to redress the violation of Ms. Faulkner's rights was to order her immediate admission into the Corps of Cadets program. *Id.* at 568, (App. 62a-63a). The remedial order was supported by a series of specific findings. The court found that defendants refused to propose or develop any remedial plan while still doing their utmost to keep Ms. Faulkner out of The Citadel. It found that the remedial plan offered by defendants "does not select any one remedy or even prioritize those suggested." *Id.* at 561, (App. 47a). The court found that "no effort has been made to determine the feasibility of any specific remedy" or even contact the state legislature about the plan. *Id.*, (App. 47a). The District Court further found that "[n]ot once has a defendant done anything to indicate that it is sincerely concerned to any extent whatsoever about Faulkner's constitutional rights." *Id.* at 567, (App. 61a-62a). It concluded that:

> [A]ll of the actions witnessed by this court clearly and unequivocally indicate that the defendants would exert all of their considerable influence to insure that Faulkner would never have the opportunity to enroll in such a parallel institution or program.

Id. at 568, (App. 62a).

In addition, the court found that The Citadel could not afford to go private, and that it would take up to ten years before a new institution could be completed. *Id.* at 561, (App. 47a-48a). Because of the inevitable appeals that would follow in this case, the court calculated that a final judgment could not be expected until the summer of 1996. By that time, Ms. Faulkner will have completed her junior year, and will no longer be eligible to join the Corps of Cadets. Accordingly, the District Court found that "[t]ime is not on the side of Faulkner." *Id.* at 567, (App. 62a).

Under all of these circumstances, the District Court held that Ms. Faulkner was entitled to immediate admission into

the Corps of Cadets and entered a final judgment on August 5, 1994, specifying the details of her admission. (App. C). In contrast to *VMI*, where the Virginia district court found that the admission of women into VMI would "destroy" its program (*see United States v. Commonwealth of Virginia*, 44 F.3d 1229, 1233, 1239 (4th Cir. 1995) ("*VMI II*"), the District Court in *Faulkner I* found that the admission of Ms. Faulkner to The Citadel did not require any changes in its structure, methodology or physical standards. (App. B). The Court of Appeals granted defendants' application for a stay in a 2-1 decision, without opinion. (App. 102a-103a). Judge Hall filed a dissenting opinion. *Id.*

E. *The Court of Appeals' Decision in Faulkner II*

On April 13, 1995, the Court of Appeals for the Fourth Circuit affirmed the liability determination of the District Court, but modified the remedial order. It held that The Citadel's males-only admission policy violates the right of Ms. Faulkner and other qualified young women to equal protection and that South Carolina provides men with a unique and valuable military-style education at The Citadel, while denying women any comparable opportunity. *Faulkner II*, 51 F.3d at 451 (Hall, J. concurring), (App. 19a-20a).

The Court of Appeals also agreed with the District Court that defendants failed to offer any remedy for the violation of Ms. Faulkner's rights and that their actions "clearly and unequivocally" indicated that they would use "all of their considerable influence" to ensure that Ms. Faulkner was excluded from any remedial plan. *Id.* at 446-47, (App. 10a-11a). It found that defendants were on notice since 1992, that South Carolina must select a remedial course, when the Fourth Circuit Court of Appeals held that VMI's males-only admission policy was unconstitutional. *Id.* at 447, (App. 11a).

While the Court of Appeals recognized that many women could perform as well as men at VMI and The Citadel, it modified the District Court order immediately admitting Ms.

Faulkner into The Citadel to permit South Carolina yet another opportunity to propose a separate program for women before August 1995. The Court of Appeals held that "the principles stated in *VMI I* and *VMI II* apply to this case." *Id.* at 444, (App. 4a). It also held that, under *VMI II*, South Carolina could remedy the violation of Ms. Faulkner's constitutional rights by creating a separate, non-military program for women that differs "in form and detail" from The Citadel's Corps of Cadets program. *Id.* at 443, (App. 4a).

In the decision below, the Court of Appeals in *Faulkner II* expressly relied upon the factual findings of the Virginia district court in *VMI* that (1) single-sex education provided significant benefits to both men and women and (2) the admission of women, to VMI would destroy the educational method of its program. *Faulkner II*, 51 F.3d at 444, (App. 4a); *VMI II*, 44 F.3d at 1233, 1239. The Court of Appeals conceded that the District Court in *Faulkner* did not try either of these issues, and that the District Court explicitly preserved the right of Ms. Faulkner and the United States to offer evidence disputing the alleged pedagogical benefits of The Citadel's single-sex program or any other issue that distinguished The Citadel from VMI. *Faulkner II*, 51 F.3d at 444, (App. 6a). The Court of Appeals nevertheless reiterated that "established differences in the educational needs" of most (but not all) men and women justifies offering women a non-military program which is fundamentally different from VMI or The Citadel. *Id.* at 443-44, (App. 4a). The Court of Appeals held that women are not even entitled to a "separate but equal" education afforded racial minorities prior to *Brown v. Board of Education*, 347 U.S. 483 (1954) ("*Brown I*"), but merely a separate and "*substantively comparable*" program that does not offer women the unique methodology, prestige and history offered to men at The Citadel. *Faulkner II*, 51 F.3d at 448, (App. 14a) (emphasis added); *see also*, *VMI II*, 44 F.3d at 1241-42.

In a concurring opinion, Judge Hall concluded that the only remedy possible was the integration of women into VMI

and The Citadel. Judge Hall disagreed with the principles in *VMI I* and *VMI II*, stating that while he was bound to respect the precedents of the Fourth Circuit, "I am convinced that we have embarked on a path that will inevitably fall short of providing women their deserved equal access to important avenues of power and responsibility." *Faulkner II*, 51 F.3d at 450, (App. 19a). He concluded that, under *Brown I*, "the opportunity of an education[,] . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms . . . Separate educational facilities are inherently unequal." *Id.* at 451, (App. 19a).

Judge Hall wrote that the Fourth Circuit decisions in this case "promoted a means to an end — single gender education — to the status of an end in itself and avoided ascertaining, let alone analyzing, the true purpose behind the state's decision to keep women out of VMI." *Id.*, (App. 19a). He rejected Judge Niemeyer's assumption that *Faulkner* and *VMI* are about single-gender education, concluding instead that they "have very much to do with wealth, power, and the ability of those who have it now to determine who will have it later." *Id.*, (App. 20a). He explained:

> The daughters of Virginia and South Carolina have every right to insist that their tax dollars no longer be spent to support what amount to fraternal organizations whose initiates emerge as full-fledged members of an all-male aristocracy . . . As we prepare, together, to face the twenty-first century, we simply cannot afford to preserve a relic of the nineteenth.

Id., (App. 20a).

F. *Six Active Judges on the Court of Appeals Voted in Favor of Rehearing VMI II En Banc*

After polling the full court at the request of one of its members, the Court of Appeals voted to deny an en banc re-

hearing in *VMI II*, 52 F.3d 90 (4th Cir. 1995). Six of the judges of the Court of Appeals voted to grant rehearing of the case; four opposed and three of the judges voluntarily disqualified themselves.[3] Judge Motz issued a dissenting opinion in favor of rehearing, joined by Judges Hall, Murnaghan and Michael. Citing Judge Hall's concurrence in *Faulkner II*, the dissent agreed that these cases are not about preserving "single-gender education as a bona-fide educational 'technique,'" but about preserving VMI "from the unwelcome intrusion of women." *Id.* at. 92 n.3. The dissent concluded as a matter of law that, under *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), "simply providing single-gender education cannot constitute a state's legitimate and important objective for excluding one gender from a state-financed institution." *Id.* at 92. The dissent concluded that a degree from a "yet to be implemented supplemental program" at a women's college cannot be considered "'substantially comparable' to a degree from a venerable . . . military institution established more than 150 years ago." *Id.* at 93.

G. *South Carolina's Remedial Proposal*

On June 5, 1995, defendants filed with the District Court a proposed remedial plan to create a non-military leadership program for women at Converse College, a private women's college in Spartanburg, South Carolina. The plan is patterned after the Mary Baldwin Plan in *VMI II*. Defendants contend that the Fourth Circuit in *Faulkner II* held that the principles of *VMI I* and *VMI II* apply in this case and have filed a motion to limit the issues at trial to (1) whether the program has the same mission and goals as The Citadel; and (2) whether it is intended to achieve the same outcomes as The Citadel. The

---

[3] Under the rules of the Fourth Circuit, a majority of the active judges must vote in favor of rehearing; disqualified judges are nevertheless included in the calculation. Consequently, even though six judges out of the ten voted for rehearing, the motion was nevertheless denied.

District Court is to hold hearings later this month to consider the schedule for review of South Carolina's remedial plan.[4]

H. *Supreme Court Review in VMI II and Faulkner II*

On May 26, 1995, the United States filed a petition for certiorari seeking review of the Court of Appeals' decision in *VMI II*. The petition presents the issue of whether the facts and circumstances in *VMI II* justify a separate program for women at Mary Baldwin College.

On June 30, 1995, The Citadel sought and obtained an extension of time for presenting a petition for a writ of certiorari on this case.

REASONS FOR GRANTING THE WRIT

I

THIS CASE RAISES ISSUES OF EXCEPTIONAL IMPORTANCE REGARDING STATE-SPONSORED GENDER DISCRIMINATION

The decision below reinvokes the wholesale exclusion of an entire class of persons from unique and prestigious public

---

[4] Petitioner acknowledges that the current procedural posture of this case is different from *VMI* where the validity of the Mary Baldwin Plan has already been upheld. In this case, the constitutionality of the Converse Plan has not yet been tested under the Fourth Circuit's diluted equal protection standard. The Fourth Circuit's erroneous legal standard, however, will govern all future proceedings in the District Court and on appeal, absent Supreme Court review. In similar situations in the past, this Court has exercised its jurisdiction to determine an important issue of law which is fundamental to the further conduct of the case. *See, e.g., Estelle v. Gamble*, 429 U.S. 97 (1976); *Land v. Dollar*, 330 U.S. 731 (1947). That course makes special sense here given the pendency of a petition for certiorari in the *VMI* case.

institutions of higher education that has not been countenanced by this Court since *Plessy v. Ferguson*, 163 U.S. 537 (1896), when separate educational facilities for African-Americans were lawful. *Faulkner II* authorizes South Carolina to remedy the discriminatory exclusion of Ms. Faulkner from The Citadel by creating a brand-new "separate and unequal" program for women that lacks the prestige or reputation of The Citadel. In authorizing a segregated and manifestly inferior program for women, the Fourth Circuit relied upon stereotypical and overly broad generalizations about the educational needs of most women and men reminiscent of those used to justify racial segregation.

Denying Ms. Faulkner admission to The Citadel because most women may not benefit from a military-style program conflicts with a long line of Supreme Court cases, beginning with *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), which hold that the right to equal protection is personal and belongs to each individual. In *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2112 (1995), this Court reaffirmed "the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups." The Fourth Circuit's decision violates this fundamental principle, denying Ms. Faulkner (and countless other women) admission to a program for which she is qualified solely because of her membership in a group which, like African-Americans, historically has been denied access to important avenues of power and opportunity.

This case is not about South Carolina's failure to provide women with "single-sex education," nor is it about a classification based upon "homogeneity of gender," as the Fourth Circuit held in *VMI II*. *VMI II*, 44 F.3d at 1233. It is about the historical exclusion of women from a unique and prestigious state military college and about "wealth, power, and

the ability of those who have it now to determine who will have it later." *Faulkner II*, 51 F.3d at 451, (Hall, concurring). (App. 20a).[5] Ms. Faulkner is entitled not merely to a "comparable education" at another college, but "equal access to important avenues of power and responsibility" that The Citadel offers its male graduates and alumni. *Id.*, (App. 19a).

A. *The Decision Below Rests on Outmoded Stereotypes About Women That This Court has Rejected as a Basis for Gender-Based Classifications*

The decision below is based upon generalizations and stereotypes expressly prohibited by this Court in *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), and other cases. While the Court of Appeals explicitly found that some women would succeed at The Citadel and VMI, it nevertheless permitted South Carolina and Virginia to exclude *all* women because most women would not benefit from a military-style program. *VMI II*, 44 F.3d at 1233, 1239, 1241. Even if there is some statistical support for the argument that some women (and men) might benefit from a non-military program, Ms. Faulkner cannot be excluded from The Citadel based simply upon a finding that most women are physically or psychologically unfit to participate in a military-style program. *See J.E.B.*, 114 S. Ct. at 1427 n.11. And even if there is a "measure of truth" in some of the stereotypes used to justify gender classifications, that fact alone *cannot* support discrimination on the basis of gender. *Id.*[6]

---

[5] Nor is this a case about compensatory educational programs for historically disadvantaged groups. Respondents do not assert that the sex-segregated programs proposed in this case or *VMI* are an affirmative attempt to rectify historical discrimination against women.

[6] *See also Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (holding unconstitutional a Social Security Act classification authorizing benefits to widows but not to widowers despite the fact that the justifica-

(Footnote continues on following page)

The Court of Appeals also based its exclusion of women on its observation that:

> If we were to place women and men in the same adversative relationship inherent in the VMI program, we would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes.

VMI II, 44 F.3d at 1239. This genteel notion of a sense of decency between the sexes is reminiscent of chivalric, paternalistic rationales for treating women as less than equals. It is a modern day equivalent of the protectionist rationales used, for example, to limit women's employment opportunities (*see Muller v. Oregon*, 208 U.S. 412, 421 (1908) (women who work long hours on their feet suffer effects "injurious upon the body, and as healthy mothers are essential to vigorous offspring, their physical well-being becomes an object of public interest and care"); and to exclude women from juries (*see, e.g., Mississippi v. Hall*, 187 So. 2d 861, 863 (Miss.), *appeal dismissed*, 385 U.S. 98 (1966) (women may be excluded from juries in part "to protect them . . . from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial")). Just as this Court found that "[Mississippi University for Women]'s policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job"

(Footnote continued from preceding page)

tion for the differential treatment was "not entirely without empirical support"); *Craig v. Boren*, 429 U.S. 190, 201 (1976) (invalidating an Oklahoma law that established different drinking ages for men and women although evidence supporting the differential was "not trivial in a statistical sense"); *Hogan*, 458 U.S. at 726 (gender may not be used as a "proxy for other, more germane bases of classification") (citation omitted).

(*Hogan*, 458 U.S. at 729), so does the exclusion of women from the Corps of Cadets perpetuate the stereotyped view of the military as exclusively a man's job.

B. *The Fourth Circuit's "Special Intermediate Scrutiny" Test Effectively Eliminates Heightened Scrutiny in Gender Discrimination Cases*

The decision below is flatly inconsistent with the decision in *Hogan*, in which the Court struck down a state-sponsored nursing program that excluded men solely on the basis of their gender. In order to reach this result the Fourth Circuit contrived its own "special intermediate scrutiny test." *VMI II*, 44 F.3d at 1237. Under traditional intermediate scrutiny, a gender classification is unconstitutional unless it is substantially related to an important state interest. *Hogan*, 458 U.S. at 724. The test manufactured by the Court of Appeals effectively substitutes review under the rational basis test in place of the heightened scrutiny required by this Court in reviewing gender classifications. It eliminates the requirement in *Hogan* that a state demonstrate that its asserted governmental objective is sufficiently important to justify its proposed remedy, calling instead for deference to a state's policy so long as the purpose is not pernicious and does not violate traditional notions of the role of government. *VMI II*, 44 F.3d at 1237. The Court of Appeals concedes that "[t]he cautious approach to this first prong of intermediate scrutiny effectively redirects the court's focus on evaluating the state's means for obtaining its objective, which is the second step to the *Hogan* analysis." *Id.* at 1236. This deferential treatment of a state's proffered justification insulates from scrutiny the very kinds of state declarations of purpose that courts are required to scrutinize, a dangerous throwback to the pre-*Reed* v. *Reed*[7] era, when gender classifications were presumed valid. As a result of the deferential approach, *VMI II* failed to in-

---

[7] 404 U.S. 71 (1971).

quire whether Virginia's asserted objective in offering single-gender education in fact was the actual purpose of Virginia's remedial proposal, rather than its self-evident desire to perpetuate the tradition of the school as an all-male institution.[8]

Even if the state genuinely seeks to offer single-sex opportunities to women, it cannot justify excluding women from the unique benefits of The Citadel or VMI based upon the benefits that men receive. Under *Hogan*, a state may not justify the exclusion of women from The Citadel by arguing that the classification benefits men. *Hogan*, 458 U.S. at 731 n.17. As this Court explained in *Hogan*, "since any gender-based classification provides one class a benefit or choice not available to the other class, . . . [the] argument begs the question." *Id.*

By holding that South Carolina can continue to exclude Ms. Faulkner from The Citadel so long as it offers her a "substantively comparable" education at another college, *Faulkner II* also conflicts with *Hogan*. This Court in *Hogan* held that the exclusion of men from Mississippi University for Women's all-female nursing program was unconstitutional even though Mississippi offered men comparable nursing programs nearby. *Hogan*, 458 U.S. at 718. In this case, the classification under attack is the males-only admission policy of The Citadel, not the system of higher education as a whole. Whether or not South Carolina offers women opportunities for a college education elsewhere is just as irrelevant as whether the male

---

[8] After reviewing the historical record in *VMI*, Judge Phillips concluded that "the actual, overriding purpose of the proposed separate-but-equal arrangement remains the preservation by that means of the original 1839 policy of excluding women from VMI, a policy that unquestionably has been driven unchanged since its origins by a stereotyped view of the proper role and capabilities of women in society . . . ." *VMI II* 44 F.3d. at 1248.

plaintiff in *Hogan* could attend another public nursing program.[9]

As Judge Motz concludes, the holding in *VMI II* and *Faulkner II* that colleges can reach similar results with different methods is logically inconsistent with finding that the exclusion of women is substantially related to an important governmental objective. If the Fourth Circuit is correct, then The Citadel and VMI can achieve similar outcomes even if the admission of women required them to adopt a different educational method. On the other hand, if the adversative method is essential to the nature of The Citadel or VMI, then a non-adversative program for women cannot be either equal or comparable. The Fourth Circuit uses a double standard in measuring equal protection: men are entitled to a unique educational methodology offered by The Citadel, unsullied by the presence of women, but women are merely entitled to "comparable outcomes."

C. *The Decision Below Provides Women With Even Less Legal Protection Than the Discredited Doctrine of "Separate But Equal"*

In *Brown I*, this Court recognized that "education is perhaps the most important function of state and local governments." This Court held that "the opportunity of an education[,] . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown I*, 347 U.S. at 488; *see also United States v. Fordice*, 112 S. Ct. 2727 (1992). Ms. Faulkner is entitled to the opportunity for an education that is equal to that offered men at The Citadel, not a "substantively comparable" program that

---

[9] This Court has rejected a similar "bottom line" defense under Title VII that discrimination against women in a particular program can be justified by proving that the system as a whole treats women "fairly." *Connecticut v. Teal*, 457 U.S. 440 (1982).

lacks the historical benefit and prestige of a degree from a venerable institution established over 150 years ago. *See Faulkner II*, 51 F.3d 450-51 (Hall, J., concurring), (App. 19a); *VMI II*, 52 F.3d at 93 (Motz, J., dissenting).

Even under the "separate but equal" rule of *Plessy v. Ferguson*, this Court recognized that a separate and newly-created educational program cannot duplicate the prestige, history or access to powerful alumni or professional networks of a well-established school. In *Sweatt v. Painter*, 339 U.S. 629 (1950), this Court rejected the argument that Texas could remedy the exclusion of a black student from its only law school by creating a separate and new law school for blacks. This Court held that a separate program could not provide "those qualities which are incapable of objective measurement but which make for greatness" in a school, including the same reputation, "position and influence of the alumni, standing in the community, traditions and prestige" offered to whites at the University of Texas Law School. *Id.* at 634; *see also McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950) (Court rejected parallel program for black graduate student which necessarily deprived blacks' equal opportunity to study, learn and associate with peers with whom they will associate in future occupational and professional pursuits).

By approving a second-class program for women, the Court of Appeals' decisions in *Faulkner II* and *VMI II* directly conflict with *Sweatt* and *McLaurin*. As the Virginia district court held in *VMI*, "if separate but equal is the standard by which the [remedial] plan must be measured, then it surely must fail." *United States v. Commonwealth of Virginia*, 852 F. Supp. 471, 475 (W.D. Va. 1994), *aff'd*, *VMI II*, 44 F.3d 1229 (4th Cir. 1995). Once a federal court finds that a state has unlawfully excluded a group of students from a public educational program, the only appropriate remedy is for the state to admit the excluded individuals and to remedy the effects of the prior discrimination. *See, e.g., Brown I*, 347 U.S. at 493; *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Florida*

ex rel. Hawkins v. Board of Control, 350 U.S. 413 (1956) (ordering the immediate admission of a black student into the University of Florida Law School, the only law school in the state); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (upholding immediate admission of a black student to the only public law school in Oklahoma). While *Brown* and *Sweatt* involve race-based segregation in education, they rest on principles of equal protection equally applicable to segregation based upon gender. By branding all women as inappropriate or unfit to study at The Citadel, *Faulkner II* perpetuates historical prejudices and stereotypes that denigrate the accomplishments of individual women. Denying Ms. Faulkner the unique benefit of The Citadel solely because of her membership in a group of persons defined by their sex, rather than her merits as an individual, is invidious and unconstitutional.

II

THIS CASE OFFERS THE COURT AN OPPORTUNITY TO ANSWER THE UNRESOLVED QUESTION OF WHETHER STRICT SCRUTINY APPLIES TO GENDER CLASSIFICATIONS

Ms. Faulkner has contended throughout this litigation that South Carolina's attempt to create a separate and plainly unequal program for women, rather than admit women to the all-male preserve of The Citadel itself, is not substantially related to any important state interest and thus cannot survive even so-called intermediate scrutiny. It is equally apparent, however, that the intermediate scrutiny test has been unevenly applied by the lower courts and, as this case and *VMI* demonstrate, has often failed to protect the equal rights of women. Ms. Faulkner respectfully submits that this case provides an appropriate opportunity for the Court to hold that a state's decision to perpetuate the exclusion of women from The Citadel, rather than admit Ms. Faulkner, is inherently suspect under the Fourteenth Amendment.

South Carolina's decision to propose a remedy premised upon the continued exclusion of women from The Citadel, after having engaged in unlawful and invidious discrimination against women for over 153 years, should be considered inherently suspect. Instead, the decision below permits South Carolina to segregate women in a separate, non-military college based entirely upon generalizations and stereotypes about women that would be rejected out of hand if applied to racial or ethnic minorities. It reinvokes a history of exclusion of women from public education and denies Ms. Faulkner admission to a prestigious public educational program based solely upon an inherited identifying trait over which she has no control, rather than on the basis of her individual ability and accomplishments. For all of these reasons, South Carolina should be required to prove that the continued exclusion of women from The Citadel is narrowly tailored to meet a compelling governmental interest.

On several recent occasions this Court explicitly has reserved the issue of whether strict scrutiny applies to gender classifications. *J.E.B.*, 114 S. Ct. at 1425 n.6 (the Court "once again need not decide whether classifications based on gender are inherently suspect"); *Harris v. Forklift Sys.*, 114 S. Ct. 367, 373 (1993); *Hogan*, 458 U.S. at 724 n.9; *Stanton v. Stanton*, 421 U.S. 7, 13 (1975). This Court's decisions under the Fourteenth Amendment nevertheless "reveal a strong presumption that gender classifications are invalid." *J.E.B.*, 114 S. Ct. at 1433 (Kennedy, J., concurring). For example, in *J.E.B.*, this Court struck down peremptory challenges based upon gender under the same reasoning used in *Batson v. Kentucky*, 476 U.S. 79 (1986), to invalidate peremptory challenges based on race. In so doing, this Court reaffirmed without qualification "what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause." *J.E.B.*, 114 S. Ct. at 1422. That is so because gender is not usually relevant to any legislative classifications. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Frontiero, v. Richardson*, 411 U.S. 677, 687-88 (1974).

As this Court explained in *J.E.B.*, state policies that exclude women, like those that exclude racial minorities, historically have been rooted in prejudicial attitudes about the relative abilities and roles of men and women. *J.E.B.*, 114 S. Ct. at 1422. This Court explicitly rejected the argument that "gross generalizations that would be deemed impermissible if made on the basis of race are somehow permissible when made on the basis of gender." *Id.* at 1427. Like race, gender is an unconstitutional proxy for other characteristics. *Id.* at 1421. Citing the plurality opinion in *Frontiero*, which applied strict scrutiny in reviewing a gender classification, this Court summarized the "long and unfortunate history of sex discrimination" against women:

> [T]hroughout much of the 19th century *the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.* Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right — which is itself 'preservative of other basic civil and political rights' — until adoption of the Nineteenth Amendment half a century later.

J.E.B., 114 S. Ct. at 1425 (citing *Frontiero*, 411 U.S. at 685 (emphasis added)); *see also Mathews v. Lucas*, 427 U.S. 495 (1976) (historic legal and political discrimination based upon sex, like discrimination based on race, has been severe and pervasive).

Because the issue of whether strict scrutiny applies to gender classifications remains unresolved, lower courts have repeatedly misinterpreted "intermediate scrutiny." Clarifying the appropriate standard of review would provide essen-

tial guidance to lower courts and resolve the serious confusion among lower courts as to application of intermediate scrutiny. Prior decisions have not required the resolution of this issue because most sex-based classifications have failed to meet even a more permissive standard. *See, e.g., J.E.B.*, 114 S.Ct at 1425 n.6. This case, likewise, can be resolved within the framework established by *Hogan* and *J.E.B.*, but Ms. Faulkner respectfully submits that jurisprudential and practical considerations militate in favor of clarifying that classifications based on sex, like those based on race and ethnicity, require strict scrutiny.

The decision below exemplifies the serious confusion surrounding application of the appropriate level of review. In upholding a "separate and unequal" program for women, the Court of Appeals held that differences in the educational needs of men and women justified wholly different educational programs. The Court of Appeals ignored the holdings of this Court in *J.E.B.* and *Hogan* rejecting classifications based upon generalizations about men and women as groups. Instead of treating such generalizations as suspect, it held that "intermediate scrutiny" presumes, as a starting point, that there are acknowledged differences between women and men, not just in their roles in human reproduction, but in their psychology, temperament and emotional characteristics. It held that different facilities for men and women could be justified upon generalized "differences" between men and women as a group, even if individual women like Shannon Faulkner can meet all of the qualifications of The Citadel. Intermediate scrutiny was designed to *eliminate* such assumptions, not validate them. *Craig v. Boren*, 429 U.S. 190, 198-99 (1976); *J.E.B.*, 114 S. Ct. at 1425; *see also Cleburne*, 473 U.S. at 440.

In addition, legal scholars have noted the confusion that has arisen among lower courts as to which standard of scrutiny to apply to gender-based affirmative action programs after this Court's decision in *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989) (establishing strict scrutiny as standard of review for race-based affirmative action plans). *See,*

e.g., S. Oliver, Jr., *A Survey of Post-Croson Developments*, 38 Loyola L. Rev. 7, 36 (1992); T. Aleinkoff, *A Case For Race-Consciousness*, 91 Colum. L. Rev. 1060, 1095 n.168 (1991). One irrational result has been that, in some federal courts, some remedial measures for sex discrimination have been judged under strict scrutiny, while others have been judged under intermediate scrutiny. For example, while the Sixth Circuit has applied strict scrutiny to invalidate gender-based affirmative action programs, the Ninth Circuit has applied intermediate scrutiny to uphold gender-based affirmative action programs. *Compare, e.g., Conlin v. Blanchard*, 890 F.2d 811 (6th Cir. 1989), *aff'd*, 947 F.2d 944 (6th Cir. 1991) (per curiam) (applying strict scrutiny to invalidate program), *with, Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992) (applying intermediate scrutiny to uphold program). This pattern of inconsistency is not likely to abate given this Court's recent decision in *Adarand*, subjecting race-based affirmative action programs to strict scrutiny.

Although women have won significant legal gains since the early 1970s, the need still exists for a consistent nationwide application of principles of women's equality before the law. It is still true, moreover, as it was when this Court decided *Frontiero*, that "in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena." *Frontiero*, 411 U.S. at 686.

III

THIS COURT'S CONSIDERATION OF THESE CONSTITUTIONAL ISSUES WOULD BE ENHANCED IF THE COURT HAD THE OPPORTUNITY TO REVIEW THE RECORD AND ARGUMENTS IN BOTH THIS CASE AND VMI

This Court's landmark decision in *Brown I* was not based solely on the record in *Brown* itself. Rather, this Court granted certiorari in three other school desegregation cases at the same time. *Brown I*, 347 U.S. at 486. The Court's perspective on the issues presented was undoubtedly enhanced by the ability to review more than one record and to consider the legal perspectives presented by different parties. Likewise, Ms. Faulkner respectfully submits that the Court's appreciation for the issues presented by this controversy would be enhanced if certiorari were granted in both this case and *VMI*. There are important differences in the legal arguments and factual records between *Faulkner II* and *VMI II* that make this case a very appropriate vehicle to review these important issues.

First, the factual record in *Faulkner II* is different in material respects from that in *VMI*, where the trial court in Virginia found that the admission of women to VMI would destroy its military program. In contrast, there was no such finding in the Citadel case. Moreover, The Citadel concedes in this case that Ms. Faulkner and other women could fulfill all requirements of the Corps of Cadets program. JA 237-38; JA 739. Its experts admit that the admission of women would not impair the ability of the college to fulfill its mission. The District Court in *Faulkner*, in contrast to *VMI*, did not try the issue of whether single-sex education has pedagogical value, or whether coeducation would destroy The Citadel's program. Ms. Faulkner continues to maintain that there is no evidence that males-only colleges provide men with unique or important benefits. In addition, the District Court in this case held

that it is a goal of South Carolina to assure the participation of women on an equitable basis. *Faulkner I*, 858 F. Supp. at 558, (App. 42a). In contrast to Virginia, in South Carolina, there is an explicit statute ensuring equal access and educational opportunity for all citizens, and the Commissioner of Higher Education conceded at trial that the exclusion of women from The Citadel violated a state policy of providing women equal educational opportunity. *See* S.C. Code Ann. §§ 59-104-610(4); JA 594.

Second, the legal arguments raised in this petition offer a different perspective from those raised in *VMI* and will provide this Court with additional assistance in fashioning an appropriate standard for these equal protection issues. The United States has relied primarily on the factual claim that the program of instruction offered to women at Mary Baldwin College is not equivalent with the program of instruction offered to men at VMI. That is undeniably true and Ms. Faulkner is prepared, if necessary, to make the same factual argument with regard to the separate program for women that South Carolina has proposed creating at Converse College. However, as distinct from the United States, Ms. Faulkner has argued throughout this litigation that the state cannot, as a matter of law, respond to a finding of invidious discrimination by creating a separate school for women whose sole raison d'etre is to preserve The Citadel as a traditional and privileged all-male domain. Ms. Faulkner has also raised the issue of strict scrutiny throughout this litigation; the United States, in *VMI*, has not.

Third, Ms. Faulkner is the only individual in either of these two litigations. She has battled for two years to gain admission to The Citadel, and has endured much in the process. The Court's decision on the issues presented by those two cases will not only shape the law, it will shape Ms. Faulkner's life in a direct and immediate way. Under the circumstances, her voice is an important one in this controversy, and should be heard by the Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY WEISBURG
THOMAS F. SWIFT
MARY K. WARREN
VANESSA BEEVER
Shearman & Sterling
153 East 53rd Street
New York,
New York 10022
(212) 848-2000

ROBERT R. BLACK
23 Broad Street
P.O. Box 643
Charleston,
South Carolina 29402
(803) 577-5806

SUZANNE E. COE
Silver & Coe
P.O. Box 431
Greenville,
South Carolina 29602
(803) 370-9086

VALORIE K. VOJDIK
Counsel of Record
New York University
School of Law
137 MacDougal Street
New York,
New York 10012
(212) 998-6550

SARA L. MANDELBAUM
STEVEN R. SHAPIRO
JANET GALLAGHER
American Civil Liberties
Union Foundation
Women's Rights Project
132 West 43rd Street
New York,
New York 10036
(212) 944-9800, Ext. 521

July 10, 1995

APPENDIX A

Opinion of the
United States Court of Appeals
for the Fourth Circuit

51 F.3d 440

Shannon Richey FAULKNER; United States of America,
Plaintiffs-Appellees,
v.
James E. JONES, Jr., Chairman, Board of Visitors of
The Citadel, et al.,
Defendants-Appellants.

No. 94-1978.

United States Court of Appeals,
Fourth Circuit.

April 13, 1995.

Before HALL, NIEMEYER, and HAMILTON, Circuit Judges.

Affirmed as modified and remanded by published opinion. Judge NIEMEYER wrote the opinion in which Judge HALL concurred. Judge HALL wrote a separate concurring opinion; Judge HAMILTON wrote a dissenting opinion.

NIEMEYER, Circuit Judge:

We are presented with the questions of (1) whether South Carolina and The Citadel, in refusing Shannon R. Faulkner admission to The Citadel, denied her equal protection of the laws in violation of the Fourteenth Amendment and (2) whether the remedy ordered by the district court is an appropriate one. In a bifurcated remedial order, the district court directed first that Faulkner be admitted to The Citadel's Corps of Cadets "forthwith" and second that South Carolina and The Citadel proceed "without delay" to formulate, adopt, and implement a plan for women other than Faulkner by the be-

ginning of the 1995-96 school year which conforms with the Equal Protection Clause.

We affirm the district court's ruling that South Carolina and The Citadel are denying Faulkner equal protection of the laws in violation of the Fourteenth Amendment. As for the remedy, we affirm with modification, remanding the case to the district court (1) to establish a new, practicable but prompt timetable in requiring defendants to formulate, adopt, and implement a remedial plan that conforms with the Equal Protection Clause, and (2) to require The Citadel to admit Faulkner to the Corps of Cadets by the date in August 1995 when the Cadets are required to report, if such plan is not approved by the court and implemented before that date.

I

When Shannon Faulkner, a female high school senior, was refused admission to The Citadel, South Carolina's state-supported military college, pursuant to its male-only admission policy, she filed suit under 42 U.S.C. § 1983, alleging that South Carolina and The Citadel denied her equal protection of the laws in violation of the Fourteenth Amendment. Pending the litigation, the district court, by preliminary injunction, required The Citadel to allow Faulkner to attend day classes, but did not order The Citadel to admit her to the Corps of Cadets, and we affirmed that preliminary injunction. *Faulkner v. Jones*, 10 F.3d 226 (4th Cir.1993). Following a two-week bench trial on the merits, the district court found that the defendants were in violation of the Equal Protection Clause and ordered, on July 22, 1994, that The Citadel "forthwith admit Shannon Richey Faulkner to the South Carolina Corps of Cadets under such terms and conditions as this court hereafter orders." *Faulkner v. Jones*, 858 F.Supp. 552, 569 (D.S.C.1994). The court also directed that for women other than Faulkner the defendants "without delay ... formulate, adopt, and implement a plan that conforms with the Equal Protection Clause." *Id.* Pursuant to a subsequent hearing to determine the conditions under which Faulkner would be admitted to the Corps of Cadets, the court entered an order on

August 5, 1994, accepting those conditions on which the parties agreed and resolving their remaining disagreements.[1]

This appeal followed.

II

In *United States v. Commonwealth of Virginia* (*VMI I*), 976 F.2d 890 (4th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2431, 124 L.Ed.2d 651 (1993), we held that Virginia's maintenance of a male-only admissions policy at Virginia Military Institute (VMI) without the provision of a comparable opportunity for women was not justified by a state policy of providing diversity in education, and we therefore concluded that Virginia was violating the Equal Protection Clause. We remanded the case to the district court to give Virginia the responsibility of selecting a remedial course, and we noted that, among available permissible courses of action, Virginia could (1) change its policy at VMI and admit women, adjusting the program to implement that choice; (2) establish parallel institutions or programs for men and women; or (3) abandon state support of VMI, allowing that institution to pursue its own policies as a private institution. On remand, Virginia elected to provide single-gender education to both genders by continuing to provide male-only education at VMI and by establishing a women's institute with distinctive leadership training at Mary Baldwin College. The district court approved the plan and, in *United States v. Commonwealth of Virginia* (*VMI II*), 44 F.3d 1229 (4th Cir.1995), we affirmed.

In *VMI II*, applying a special intermediate scrutiny test designed to analyze a state's provision of single-gender education, we held that Virginia's plan of providing single-gen-

---

[1] In particular, the district court denied Faulkner's request (1) to have a special sexual harassment committee appointed, (2) to be provided a special escort on campus at night, and (3) to prohibit The Citadel from giving her the same type of haircut that it gives male Fourth Class members of the Corps of Cadets. The court also directed that Faulkner be provided living quarters with "at least the same level of security" at night as male cadets have in their barracks. The parties did not appeal the conditions imposed by the August 5 order.

der education is not a pernicious state objective. On the contrary, because the state presented sufficient data to support the proposition that a sexually-neutral environment yields concrete educational benefits, we concluded that Virginia could opt for single-gender education as a legitimate and important part of its overall objective of providing higher education to its citizens. We noted, however, that when providing single-gender education to one gender, Virginia could not, without adequate justification, deny a substantively comparable benefit to the other gender. For purposes of determining whether a parallel educational offering is substantively comparable, we held that programs aimed at achieving similar results should not be rejected simply because they differ in approach. We therefore concluded that single-gender offerings to men and women need not be identical in form and detail, but rather that differences in the programs could reflect established differences in the educational needs of the two genders so long as the value of the benefits provided to one gender did not, by comparison to the benefits provided to the other, tend to lessen the dignity, respect, or societal regard of the other gender.

The principles stated in *VMI I* and *VMI II* apply to this case.

III

South Carolina challenges the district court's ruling that South Carolina and The Citadel are denying Faulkner equal protection of the laws by refusing her admission to The Citadel and its Corps of Cadets. Without challenging any factual findings by the district court, the state argues that its overall higher education policy is administered neutrally and that there is no evidence of an invidious intent to discriminate on the basis of gender behind the admissions policies of its colleges and universities. South Carolina asserts that its present configuration of higher educational programs is the product of historical, gender-neutral factors, including student demand and institutional autonomy. It argues that if we consider all aspects of its system of higher education, including its offer-

ing of tuition grants to qualified women who attend private single-gender institutions, we would find that "the overall educational benefits and opportunities of South Carolina's system of higher education flow evenly to men and women." In the absence of evidence of intentional or invidious discrimination, the state argues, the district court erred in refusing to apply the holding of *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979) (female plaintiff challenging a gender-neutral statute on equal protection grounds must show that the "state legislature selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon [women]").

What South Carolina fails to appreciate, however, is that even if its current offering of single-gender education solely to males is the product of historical factors which were not themselves invidiously discriminatory against women, the male-only admissions policy of The Citadel is nevertheless an *explicit* gender-based classification. Although *facially neutral* statutes which have a discriminatory impact do not violate the Equal Protection Clause unless discriminatory intent can be demonstrated, *see Sylvia Development Corp. v. Calvert County, Md.*, 48 F.3d 810, 818-19 (1995), discriminatory intent need not be established independently when the classification is explicit, as in this case. *See Feeney*, 442 U.S. at 272-73, 99 S.Ct. at 2292-93; *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982).

Even though invidious discriminatory intent behind a state policy need not be shown when the policy explicitly utilizes a gender classification, we must nevertheless determine, in conducting an equal protection analysis, whether South Carolina's means for achieving its objective of single-gender education withstand intermediate scrutiny. *See VMI II*, 44 F.3d at 1237. *See also Hogan*, 458 U.S. at 724-25, 102 S.Ct. at 3336-37.

In ruling that South Carolina and The Citadel are denying Faulkner equal protection of the laws in this case, the district court applied our holding in *VMI I* to conclude that the provi-

sion of single-gender education is a legitimate and important state objective, but that the state must "articulate an important policy" that justifies offering single-gender education to men and not to women. 858 F.Supp. at 563. Comparing the circumstances of this case with those in *VMI I*, the court noted that the only difference is that in this case "we have a real, live plaintiff who, but for her sex, would probably be a member of the Corps of Cadets," whereas in *VMI I*, the United States government was the only plaintiff. 858 F.Supp. at 554 n. 2. Because the parties agreed that the benefits of single-gender education need not be retried, they only litigated the issue of whether South Carolina could sufficiently justify offering single-gender education to males and not to females.

On the issue of justification, the district court summarized South Carolina's trial position as follows:

> Simply put, the position of the defendants is that single-sex educational opportunities are not available to women in South Carolina's public system of higher education because there is insufficient demand for them.

858 F.Supp. at 564. On the issue of demand, the court stated that South Carolina failed to present evidence from which the court could conclude that there was an absence of demand among women for public single-gender education.[2] Never-

---

[2] The court observed that "no survey has been conducted to determine ... how many women would be interested in pursuing a public single-sex education" and that "[t]he interest of South Carolina women in attending a Mary Baldwin-type program [*see VMI II*] is unknown." 858 F.Supp at 560. The court also found with respect to demand among women for coeducation at The Citadel:

> The Citadel does not recruit women for the Corps of Cadets and has not through the years kept records for how many women have expressed an interest in attending the institution. In addition, no survey has been conducted to determine how many women are interested in joining

(Footnote continues on following page)

theless, it concluded as a matter of law that an absence of demand among women could not justify the provision of public single-gender education to men and not to women. The district court stated, "To suggest that a lack of demand for a certain type of equal protection can somehow justify the denial of another person's constitutional right thereto undermines the express intent of the Fourteenth Amendment." 858 F.Supp. at 564. The court accordingly concluded that South Carolina and The Citadel are denying Faulkner her rights under the Equal Protection Clause.

Even though the district court found no evidence to support a finding of inadequate demand, it relied for its ultimate finding of liability on its conclusion of law that demand is not relevant to an equal protection analysis because a person's right not to be subject to discrimination is a personal, individual right. The court held that an absence of demand among other members of plaintiff's gender cannot justify a deprivation of that right with respect to an individual plaintiff. While that principle may indeed hold true for *civil rights* guaranteed by the Constitution, *cf. J.E.B. v. Alabama ex rel. T.B.*, ___ U.S. ___, ___ - ___, 114 S.Ct. 1419, 1433-34, 128 L.Ed.2d 89 (1994) (Kennedy, J., concurring), the answer is not so clear when we consider whether and to whom the state may confer an *economic benefit*, at least in the context of single-gender education. For example, if a state chooses to offer single-gender education to each gender and if no person of one gender applies, is the state therefore precluded from offering single-gender education to the other gender? The question becomes yet more complex when we consider a single-gender educational program which requires a substan-

---

(Footnote continued from preceding page)

> the Corps of Cadets.... In the past year, however, forty-three women have inquired about The Citadel's Corps of Cadets, but the seriousness of their interest has not been determined.

Id. The court concluded, based on the experience at the U.S. military academies, that if The Citadel were to become coeducational, between 20 and 50 women would be attracted to the school annually. *Id.*

tial outlay of capital. May the state require as a condition of providing the program that a minimum number of each gender, necessary to render the program viable, apply? And what are the constitutional rights, if any, of the few who *do* apply to such a program when their numbers are insufficient to form a student base?

In this case, however, we need not resolve the difficult legal issue of whether an absence of demand among members of one gender may justify a state's failure to offer single-gender education to that gender, because we concur in the district court's finding that the defendants failed to present evidence supporting an absence of demand. While South Carolina contends that the "current absence of a Citadel for women results ... *from an absence of adequate demand by young women* to support such an institution or program" (emphasis added), it has not offered evidence sufficient to establish that absence of demand. It points to 20-year old evidence of declining student population at the all-women's state-supported Winthrop College when that school became coeducational. Yet the state also acknowledges that, even at its lowest point, demand was substantial enough at Winthrop to sustain a female student population of 2,500, a number that exceeds the present male population in The Citadel's Corps of Cadets. Moreover, the state agrees that virtually no evidence was presented on the issue of demand from the time Winthrop became coeducational to the present date. South Carolina's evidence of *current* demand among women for single-gender education consists solely of the testimony of Robert C. Gallagher, Chairman of the South Carolina Commission on Higher Education, which is the body charged with evaluating the goals of state educational institutions and with approving new educational programs. South Carolina states that "[a]ccording to Mr. Gallagher, in the 20 years since Winthrop became coeducational, not one request for a single-gender program for women, military or otherwise, has been submitted to the Commission." But the state fails to explain how this evidence is probative of the current interest of South Carolina women in pursuing single-gender education. As the attorney representing South

Carolina was required to concede at oral argument, there really is no data before this court to support a finding of an absence of demand among women at the present time for single-gender education of any type.

Thus, even though it is South Carolina's currently announced policy to provide single-gender education to both men and women and to allow gender-neutral factors, including demand and institutional autonomy, to determine whether public single-gender education will in fact be provided to each gender, this policy cannot justify the state's failure to offer single-gender education to women when an absence of demand among women for such education has not been demonstrated. We agree with the district court that South Carolina has not carried its burden of justifying its failure to afford women single-gender education. The district court's ruling that South Carolina and The Citadel are in violation of the Equal Protection Clause is therefore affirmed.

IV

South Carolina also argues that the remedy selected by the district court in this case is inappropriate. While South Carolina does not challenge the portion of the district court's order that allows the state to elect a course of action with respect to women other than Faulkner, it does object to the portion that directs The Citadel to admit Faulkner into the Corps of Cadets forthwith. Relying on general principles of comity and federalism, South Carolina asserts that it should have been given an opportunity to correct its constitutional violation before the district court imposed a remedy, citing our decision in *VMI I* (remanding case to permit Virginia to select a remedial course consistent with the Fourteenth Amendment). Recognizing that a state's unreasonable delay in complying with a longstanding remedial duty justifies the court's selection and imposition of a remedy, *see Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1970), South Carolina seeks to distinguish the facts in this case to argue that it has not defaulted

on its remedial obligation. It states that "far from seeking delay, South Carolina sought to expedite resolution of both the liability and remedy portions of this case."

The district court, however, found facts that contradict South Carolina's self-assessment. It concluded:

> At trial it became clear that nothing of substance had been done by the defendants towards fashioning a remedy.
>
> * * * * * * *
>
> Not once has a defendant done anything to indicate that it is sincerely concerned to any extent whatsoever about Faulkner's constitutional rights.
>
> * * * * * * *
>
> Time is not on the side of Faulkner. She is now [in July 1994] a rising sophomore and cannot become a member of the Corps of Cadets after the beginning of her junior year.... Admittedly, The Citadel cannot go private, and that leaves only two options remaining. One of those is a parallel institution or program, and the other is admission to the Corps of Cadets.
>
> * * * * * * *
>
> [I]t is clear that [defendants] can easily delay [the process of developing and implementing a parallel institution or program] beyond the point in time that Faulkner would ever benefit from such a program. Throughout the pendency of this action the defendants have done nothing to indicate that they would be inclined to hasten that process. To the contrary, all of the actions witnessed by this court clearly and unequivocally indicate that the defendants would exert all of their considerable influence

> to insure that Faulkner would never have the opportunity to enroll in such a parallel institution or program.

858 F.Supp. at 567-68. The court found accordingly that "the only adequate remedy available ... is [Faulkner's] immediate admission to the Corps of Cadets at The Citadel." *Id.* at 568.

Although South Carolina does not challenge the court's factual findings, some background is helpful in determining whether South Carolina's inaction should be taken into account in fashioning an appropriate remedy.

In *VMI I*, which was decided in October 1992, we concluded that the state-supported all-male military program at VMI, similar to that at The Citadel, violated the Equal Protection Clause and that Virginia was required to select the means of remedying this violation on remand.[3] We noted that Virginia could

> properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution. While it is not ours to determine, there might be other more creative options or combinations.

976 F.2d at 900. The *VMI* decision, which fairly must be construed to apply also to The Citadel, placed South Carolina on notice that it needed to pursue a remedy to address its similar situation. There can be little question that South Carolina was fully aware of the implications of *VMI I*, since many of

---

[3] *VMI I* was commenced in March 1990, *see* 976 F.2d at 894, and the district court rendered its initial opinion in June 1991, *see United States v. Commonwealth of Virginia*, 766 F.Supp. 1407 (W.D.Va. 1991).

the same lawyers who represented VMI also represent The Citadel in this case.

Several months later, in May 1993, the South Carolina General Assembly responded directly to the *VMI I* decision (and to Faulkner's March 1993 complaint), adopting Concurrent Resolution H.4170 in which South Carolina affirmed a "policy of diversity" and a "policy of choice," policies which included offering citizens of South Carolina single-gender higher education. The legislature recognized the state's responsibility for providing single-gender education for women and acknowledged that the current array of state-supported educational institutions did not include such an option. Because "the members of the General Assembly ... [believed] that it is appropriate for this State to begin the process of providing single-gender educational opportunities for women," the legislature established a 10-member committee "to assist the State of South Carolina in carrying out its responsibilities." The committee was directed to "formulate recommendations for the General Assembly to consider in exploring alternatives for the provision of single-gender educational opportunities for women," and to submit a report to the General Assembly at the beginning of its next legislative session in January 1994. The committee met four times, prepared a report, and timely submitted it to the legislature, outlining several alternatives for consideration. By operation of the law, the committee was then dissolved. The legislature, however, gave no consideration to the matter during its 1994 session and took no action on the recommendations. In an affidavit submitted later by the Speaker of the South Carolina House of Representatives, the Speaker explained:

> At this time we have little guidance as to what type of plan, if any, may be constitutionally required or allowed. We are anticipating a ruling soon from the district court in the VMI litigation which may be instructive in this regard.

The Speaker thus apparently believed that it was necessary to know whether *Virginia*'s parallel program at Mary Baldwin College would be court approved before South Carolina would decide whether and how to fulfill *its* remedial obligation.

In the meantime, in November 1993, we handed down an interim decision in this case in which we stated:

> On the state of the record as it now exists, we can perceive no reason why our holding in [*VMI I*] would not apply in this case. The Citadel is a state-supported military college not unlike the Virginia Military Institute, which was the subject of our holding in [*VMI I*].

Faulkner v. Jones, 10 F.3d at 232.

By the time of trial in May 1994, South Carolina still had made no decision on the course it would pursue. In pretrial proceedings before the district court, South Carolina filed a motion to bifurcate the trial and have the court consider the issue of liability first, before trying the issue of remedy. The court denied the motion and ordered defendants to submit a remedial plan prior to trial. Despite the order, South Carolina declined to indicate its choice of remedy either before or during trial. Rather, it requested that it be given 60 days from any liability determination to designate a specific remedy for further development.

Following trial the district court made a factual finding that South Carolina had taken no steps to determine the feasibility of any specific remedy. 858 F.Supp. at 567. It found that the privatization of The Citadel was unavailable as prohibitively expensive and that the defendants had not given any consideration to coeducation at The Citadel. *Id.* at 561. Accordingly, the court concluded that if the state still wished to maintain The Citadel as an all-male institution, the only available remedy was the establishment of a parallel institution for women. *Id.* at 568. But the court also found that creating a new women's institution in South Carolina could

take up to ten years. *Id.* at 561. It was thus that the court concluded,

> [T]here is nothing before the court at this time that permits it to determine what the defendants will do or can do to guarantee to the plaintiff her constitutional rights under the Equal Protection Clause.

Id. at 567. Because Faulkner could not become a member of the Corps of Cadets after the beginning of her junior year (in August 1995), the district court ordered that she be admitted to the Corps of Cadets forthwith as the only available remedy. *Id.* at 569.

A

It is difficult to understand why in 1992, or even in the year or two that followed, South Carolina did not consider *VMI I* to apply to it and, as Virginia did, begin the process of selecting a course to correct the problem. Even though unwillingness to face a difficult decision involving the continuation of a historically revered institution is not an adequate justification for delay, we nevertheless believe that it remains in the interest of comity that the state, and not a federal court, select its future course for educating its citizens. As we noted in *VMI I*, the state should have the opportunity to reassess its higher education policies and determine the nature of the benefits that it wishes to offer its citizens. If it elects to maintain single-gender education at The Citadel, then it must provide parallel programs for men and women that are substantively comparable. *See VMI II*. Alternatively, the state may adopt a coeducational policy for The Citadel, or it may withdraw state support from The Citadel and permit that institution to continue as a private institution. In any event, for the purpose of determining the course South Carolina will take hereafter, we remand the case to the district court to establish a timely but practicable schedule under which the state must formulate, adopt, and implement a plan that conforms with the Equal

Protection Clause of the Fourteenth Amendment and to oversee implementation of the state's plan.

The district court included this course of action as part of its remedial order, but it directed that the remedial plan be accomplished by the beginning of the 1995-96 academic year. In view of the lapse of time caused by the prosecution of this appeal and the complexity of the issues, we conclude that the time frame mandated by the district court is now impracticable. Therefore on remand, the district court should establish a new schedule, taking into account the steps reasonably necessary to formulate, adopt, and implement a remedial plan and allowing reasonable, but not dilatory, amounts of time for each step.

B

As the district court pointed out, however, the key aspect of this case that differs from *VMI I* is the presence here of an individual plaintiff whose equal protection rights have been violated. While institutional changes potentially involving substantial outlays of capital can take time, Faulkner's rights are directly affected right now. If she is not admitted to the Corps of Cadets by the beginning of her junior year in August 1995, that option becomes foreclosed to her because of The Citadel's graduation requirements. *See* 858 F.Supp. at 557 & n. 6. Foreclosure of that option in these circumstances might therefore deny Faulkner any meaningful remedy, whether through The Citadel or a parallel program for women. Moreover, the pressing nature of the time constraints on Faulkner's personal educational circumstances has been exacerbated by the lack of any state decision, as discussed above.

Analogous, but not totally similar, to Faulkner's circumstances were the remedial issues presented to the Supreme Court in *Sipuel v. Board of Regents of the Univ. of Okla.*, 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247 (1948), and *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938). In those cases, during the era prior to *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873

(1954), when the Supreme Court constitutionally sanctioned separate educational institutions for whites and blacks, qualified black students were denied admission to the state law schools of Oklahoma and Missouri while those states failed to provide comparable law schools for blacks. It was observed in those cases that Oklahoma and Missouri could have preempted judicial findings of liability under the Equal Protection Clause by pursuing one of at least three different options: (1) admitting black students to the state law school; (2) undertaking the creation of a separate law school for blacks; or (3) forgoing state support for the state law school. *See, e.g., Gaines*, 305 U.S. at 343-46, 59 S.Ct. at 233-35. At the time those cases were tried, however, the defendant states had made little or no progress toward establishing separate law schools for blacks, and the existing public law schools had not opted to forgo state funding.

Although neither Missouri nor Oklahoma had seriously pursued any efforts to preempt a judicial finding of liability, those states argued, as does South Carolina here, that it would be improper for the court to order plaintiffs admitted to the state law schools. In *Sipuel*, it was argued that the state had an insufficient opportunity to develop a separate law school for the plaintiff and that a court order admitting the plaintiff to the existing state law school would improperly foreclose the defendant's prerogative to choose which remedial option to pursue, in violation of the principles of federalism and comity. *See Sipuel v. Board of Regents of Univ. of Okla.*, 199 Okla. 36, 180 P.2d 135, 142 (1947), *rev'd*, 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247 (1948). The Supreme Court of Oklahoma was persuaded by this argument and refused to order the plaintiff admitted to the state law school, holding that to do so would wrongfully deny the defendant state "the right or option or opportunity to provide separate education in law for [plaintiff]." *Id.*

In *Gaines*, it was argued that since the discrimination against the plaintiff would be only temporary—while a law school for blacks was being developed—the resultant tempo-

rary discrimination did not rise to the level of an equal protection violation. *See* 305 U.S. at 351-52, 59 S.Ct. at 237-38.

The Supreme Court rejected the states' arguments in both cases, holding that the only constitutional remedy for the equal protection violations in the circumstances presented was for the court to order the immediate admission of each plaintiff to the respective state law school. *See Gaines*, 305 U.S. at 352, 59 S.Ct. at 237-38; *Sipuel*, 332 U.S. at 633, 68 S.Ct. at 299-300. Thus, although the defendants in those cases may have initially had three options to avoid liability under the Equal Protection Clause—admit plaintiff to the state law school for white students, create separate schools for plaintiffs, or withdraw state funding from the law school—defendants were found effectively to have forfeited the prerogative of selecting which option to pursue when, at the time of trial, they had failed to proffer from among such options a constitutionally sufficient remedy. Accordingly, the Court concluded that a judicially imposed remedy was necessary.

While the context of the *Sipuel* and *Gaines* decisions is not completely analogous—since the "separate but equal" standard is inapposite to the context of state-supported single-gender education, *see VMI II*, 44 F.3d at 1237 n.*__the basic remedial principle still applies that a state may not continue to ignore a clear judicial mandate finding a constitutional violation and still retain the opportunity to select its course of remedy. This principle applies with even greater force in a case such as this, which was filed over two years ago by an individual plaintiff who is presently in the midst of her college career and for whom time is of the essence. Thus, South Carolina may have forfeited its right to include Faulkner in its general remedial plans. We therefore provide special, conditional relief for Faulkner, requiring that she be admitted to the Corps of Cadets unless, before the beginning of Faulkner's junior year, the state provides a parallel program that meets the criteria of *VMI II* and is approved by the court, or unless the state selects some other acceptable option, as discussed in *VMI I*, 976 F.2d at 900. This conditional, special relief follows from Faulkner's circumstances and the defendants'

response to them, and it does not alter our determination that South Carolina may still elect to offer single-gender education to men and women, as discussed above. Thus, we adopt a bifurcated remedy which (1) affords the state an opportunity to select its course for providing higher education to its citizens in general, but (2) requires The Citadel to admit Faulkner to its Corps of Cadets if the state is unable to accomplish an acceptable alternative plan by August 1995.

V

In sum, for the reasons given, we affirm the district court's conclusion that South Carolina and The Citadel are in violation of the Equal Protection Clause in offering, without sufficient justification, single-gender education only to males. We also affirm the substance of the district court's remedial order, but with the modification that it establish a timely but practicable schedule for South Carolina to formulate, adopt, and implement a plan that conforms with the Equal Protection Clause, and if the plan is not court approved and implemented by the date in August 1995 when the Cadets are required to report, The Citadel must admit Shannon Faulkner to the Corps of Cadets as ordered by the district court.

AFFIRMED AS MODIFIED AND REMANDED.

K.K. HALL, Circuit Judge, concurring:

This court's VMI precedents* bear heavily upon both the result and the remedy in this case. Judge Niemeyer quite correctly concludes, *ante* at ____, that South Carolina's proffered justification for denying its daughters an educational opportunity that it provides for its sons is of no more substance than Virginia's policy of exclusion under the perverse guise of "diversity." *VMI I* at 898-99.

---

* *United States v. Commonwealth of Virginia*, 976 F.2d 890 (4th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2431, 124 L.Ed.2d 651 (1993) (*VMI I*); *United States v. Commonwealth of Virginia*, 44 F.3d 1229 (4th Cir.1995) (*VMI II*).

Although South Carolina has put off for almost three years squarely addressing the constitutional deficiency that has been obvious to all who would see, *ante* at ____, allowing the state a reasonable time to correct the deficiency is consistent with our approach in *VMI I*. However, as Judge Niemeyer recognizes, time is Shannon Faulkner's most precious possession, and it is running out. Because Judge Niemeyer's disposition of this case provides—in the absence of South Carolina's timely implementation of a remedy that comports with *VMI II*—for the soonest practicable admission of Ms. Faulkner into The Citadel's Corps of Cadets, and because I am bound to respect the precedents of this circuit, I join fully in his opinion.

I choose to write separately because I am convinced that we have embarked on a path that will inevitably fall short of providing women their deserved equal access to important avenues of power and responsibility. We began this unfortunate journey in *VMI I*, when we promoted a means to an end—single gender education—to the status of an end in itself and avoided ascertaining, let alone analyzing, the true purpose behind the state's decision to keep women out of VMI. Though we correctly concluded that maintaining the *status quo* offended the Constitution, we failed to mandate VMI's integration—and thus we failed.

Our failure became apparent in *VMI II*, long after the time had passed to ask the only question that matters: "*Why* has the state decided to create or maintain this institution for the benefit of only one gender?" Instead, we were constrained to ask a wholly irrelevant one: "Does the state offer a 'substantively comparable' educational option to the other gender?" As Chief Justice Warren once observed, separate educational facilities are inherently incomparable, substantively or otherwise. "[T]he opportunity of an education [,] ... where the state has undertaken to provide it, is a right which must be made available to all on equal terms.... Separate educational facilities are inherently unequal." *Brown v. Board of Educa-*

tion of Topeka, 347 U.S. 483, 493-95, 74 S.Ct. 686, 691-92, 98 L.Ed. 873 (1954) (*Brown I*).

In fact, though VMI, The Citadel, and their advocates have ceaselessly insisted that education is at the heart of this debate, I suspect that these cases have very little to do with education. They instead have very much to do with wealth, power, and the ability of those who have it now to determine who will have it later. The daughters of Virginia and South Carolina have every right to insist that their tax dollars no longer be spent to support what amount to fraternal organizations whose initiates emerge as full-fledged members of an all-male aristocracy. Though our nation has, throughout its history, discounted the contributions and wasted the abilities of the female half of its population, it cannot continue to do so. As we prepare, together, to face the twenty-first century, we simply cannot afford to preserve a relic of the nineteenth.

HAMILTON, Circuit Judge, dissenting:

The majority annunciates the district court's disregard of Equal Protection analysis, comity, and federalism. In disregarding the Tenth Amendment, the majority permits a single district judge to dictate the higher educational policies and related financial considerations of the State of South Carolina based on a flawed legal premise. I believe that the State of South Carolina, not the federal judiciary, is the proper authority to determine its own educational policies and to execute these policies based on its limited financial resources. Given that there is no demand for a Citadel for women in South Carolina seeking an educational experience comparable to that of The Citadel—thereby demonstrating a substantial justification—I conclude there is no equal protection violation. Because the majority eviscerates the sovereign power of the State of South Carolina, as well as ignores well-settled principles concerning the Equal Protection Clause, I dissent.

I.

A.

In May 1993, the General Assembly of South Carolina adopted a concurrent resolution to declare the public policy objectives of South Carolina's interest in establishing single-gender institutions of higher learning. This resolution stated that South Carolina had long supported single-gender education based on legitimate state interests if sufficient demand existed for single-gender programs justifying the expenditure of public funds to support such programs. Subsequently, the General Assembly of South Carolina created a Legislative Study Committee (Committee) "to assist the State of South Carolina in carrying out its responsibilities of providing single-gender educational opportunities for women...." (J.A. 1074). On January 11, 1994, the Committee reported its findings to the General Assembly. The Committee concluded that South Carolina had a long history of supporting single-gender education for both men and women when justified by demand and if consistent with the educational goal of the institution. The Committee specifically examined female interest in a single-gender military institution and ultimately found that there was no interest in, and no demand for, a single-gender military college in South Carolina for women. The Committee also reported that it was prepared to assist the General Assembly in examining further possibilities for single-gender educational opportunities for women in South Carolina. On January 14, 1994, the Committee's findings were approved and accepted by the General Assembly.

B.

After this court issued *United States v. Virginia*, 976 F.2d 890 (4th Cir.1992) (*VMI I*), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2431, 124 L.Ed.2d 651 (1993), Faulkner sought admission into the Corps of Cadets, contending that even if single-gender education was pedagogically justified and essential to

The Citadel's methodology, South Carolina could not justify offering the benefits of the Corps of Cadets to men only. Accordingly, Faulkner demanded immediate admission into the Corps of Cadets. The district court granted a preliminary injunction ordering that Faulkner be permitted to attend day classes at The Citadel. On appeal, this court sustained the preliminary injunction, but eschewed the contention that gender classification can never be justified or that facilities for the sexes must be identical. *See Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir.1993) (majority opinion) (*Faulkner I*). Rather, the majority opinion explained that facilities used to accommodate the sexes may differ, and that in analyzing the separate facilities, a court "*must* take into account the nature of the difference on which the separation is based, the relevant benefits to and the needs of each gender, *the demand* (both in terms of quality and *quantity*), and *any other relevant factor*." *Id.* (emphasis added).

Subsequently, on February 17, 1994, Faulkner moved for summary judgment, seeking immediate admission into the Corps of Cadets. With respect to liability, Faulkner argued that *VMI I* mandated liability. With respect to remedy, she asserted that coeducation of The Citadel was the only remedy; furthermore, she contested the value of single-gender education at The Citadel. The Citadel opposed Faulkner's motion for summary judgment and moved unsuccessfully to bifurcate the trial with respect to liability and remedy.

On March 1, 1994, the district court ordered a trial on the issues of liability and remedy to commence concurrently on May 16, 1994. With respect to liability, the district court ordered that the liability portion of the trial be limited to those issues that The Citadel contended differentiated this suit from *VMI I* and precluded summary judgment in favor of Faulkner. With respect to remedy, the district court ordered that The Citadel file a remedial plan by April 1, 1994. The district court ordered the remedial plan by this date and tried the issue of remedy concurrently with liability because it concluded that since the General Assembly had enacted the concurrent resolution in May 1993 and adopted the Committee's find-

ings in January 1994, The Citadel was on notice and should have been preparing a remedy. The district court issued this order despite the fact that liability had not even been determined. Complying with the district court's order, The Citadel filed a proposed remedial plan on April 1, 1994. In keeping with state policy, the plan did not propose coeducation of The Citadel as a remedy. Because there was no ruling on liability, the remedial plan provided both single-gender and coeducational remedial options and requested sixty days from any determination of liability to designate a specific remedy for further development and implementation. The result of the district court's order was that The Citadel had to propose a remedy even though no trial had commenced and its single-gender educational program had not been found constitutionally impermissible. The Citadel, therefore, had to devise a remedy, without parameters, for an unknown, alleged wrong.

During pretrial proceedings, the district court stated that it was bound by *VMI I*, but it refused to rule on The Citadel's motion *in limine* and its motion during trial for a declaration of issues as to the binding nature of *VMI I*. The Citadel sought a declaration with respect to these issues because Faulkner continued to repudiate *VMI I*. In this confused and confusing state of affairs, the case proceeded to trial. For purposes of liability, the district court reluctantly adopted the finding in *VMI I* with respect to the value of single-gender education and the inevitable fundamental changes coeducation would have on the adversative nature of The Citadel's single-gender program. From this premise, the district court stated that The Citadel had to distinguish its case from *VMI I* by "justifying" the males-only policy at The Citadel. Recognizing that *VMI I* did not hold that single-gender education amounted to a *per se* constitutional violation, The Citadel essentially offered three reasons for maintaining the males-only policy. First, The Citadel put on unrebutted evidence that the reason that there was no female Citadel in South Carolina, or elsewhere, was because there was no demand for such an institution, not because South Carolina discriminated against women based on gender. Second, South Carolina had a policy of aiding the

education of women by providing tuition grants and loans so that women could attend the state's two private women's colleges. Third, South Carolina demonstrated that it has finite resources with respect to providing funds for college programs. In a nutshell, South Carolina showed that it supported single-gender education, that it provided aid to women at institutions of higher learning, but that it could accomplish these objectives only if based on demand and consistent with the educational mission of the institution.

The district court issued a memorandum opinion reciting findings of fact and conclusions of law. With respect to liability, the district court found that South Carolina had a policy of providing a variety of educational programs in response to demand and available resources and that there was no interest in South Carolina for a Citadel-type educational experience for women. As the district court found, "[t]here does not appear to be any substantial interest in South Carolina for the establishment of an all-female military institution like The Citadel." *Faulkner v. Jones*, 858 F.Supp. 552, 560 (D.S.C.1994). Additionally, the district court recognized that there was no demand for a female-Citadel and that the policy of the State of South Carolina is "to provide educational opportunities based on reasonable demand...." *Id.* at 564. Despite these findings, the district court held that lack of demand and the expenditure of limited state resources could not justify The Citadel's male-only program. Accordingly, the district court found that The Citadel's male-only policy did not survive constitutional challenge. With respect to remedy, the district court ordered that Faulkner immediately be admitted into the Corps of Cadets. The district court further ordered The Citadel to devise a plan for coeducation of the Corps of Cadets, or it would order coeducation.

II.

The district court concluded that it was bound by *VMI I*, and thus it realized that single-gender education is valuable and eminently justified. Furthermore, the district court found that there was no demand for a "female Citadel" in South

Carolina. *See id.* at 560, 564. Despite recognizing justification for single-gender educational programs and an absence of demand for a Citadel-type institution for women, the district court concluded that South Carolina's educational policies were constitutionally irrelevant, a conclusion with which I cannot agree. A review of our precedents is necessary to reveal the flaws in the district court's reasoning. Because South Carolina articulated a substantial justification for not providing a Citadel-type institution for women, Faulkner's Equal Protection challenge fails.

A.

VMI I recognizes that, absent a substantial justification, a state violates the Equal Protection Clause if it provides a benefit to one gender but not the other. In *VMI I*, after explaining that the Equal Protection Clause does not erect a *per se* bar to a state's power to create classifications and treat various classes differently, we concluded that single-gender education not only provided academic and practical salutary consequences, *VMI I*, 976 F.2d at 897, but also that single-gender education was pedagogically justifiable, *id.* at 898.[1]

---

[1] This conclusion comports with current thought among many educated women. For instance, at Columbia College, a women's school in Columbia, South Carolina, students state that a single-gender education provides an invaluable educational experience that could not be reproduced with the presence of men. After observing an increasing trend and desire for single-gender educational institutions, the article reports that graduates of single-gender educational institutions typically excel in a variety of careers. Lori Roberts, *Single-gender Schools Gain Students, Popularity*, The State, Feb. 12, 1995. Likewise, women at Texas Woman's University have vehemently attempted to prevent the coeducation of their college. Carrying placards that read "Better Dead Than Coed," students explained the unique benefits of their single-gender education:

> Female TWU students say the school provides a nurturing environment for women. Students at protests have said that not having to ... be distracted by men improves their chances of a good education.

Women Battle to Keep Men out of Their School, N.Y. Times, Apr. 5, 1991.

Moreover, recognizing the unique, rich, and venerable history and educational philosophy propounded by the Virginia Military Institute (VMI), we concluded further that the "holistic formula of training" at VMI was particularly justified. *Id.* Balanced against the pedagogical benefits and justification provided by a single-gender institution exclusively for men, however, was the fact that the Commonwealth of Virginia could not deny these benefits to women absent a substantial justification, and the proffered reason of providing diversity in education failed to satisfy that burden. *Id.* at 900. Central to our analysis was the fact that there was no justification for the male-only policy at VMI; the issue of demand was neither raised nor addressed. Indeed, Virginia proffered no evidence of a lack of demand for a VMI-type program for women. Virginia, therefore, had defaulted on this issue. Because Virginia failed to provide an educational experience like that of VMI for women, we remanded the case to the district court to give Virginia the opportunity to remedy any constitutional violation. *Id.* In reaching our holding in *VMI I*, we acknowledged—most sagaciously—that the state, not the federal judiciary, must, in the first instance, be granted the opportunity to devise a plan that passes constitutional muster. *Id.* Satisfaction of constitutional concerns, we explained, did not mandate automatically the admission of women to VMI. The principle to be garnered from *VMI I*, therefore, is that while state-supported, single-gender educational institutions serve valuable purposes and provide unique educational benefits, a state cannot provide such a benefit to one sex and not the other, absent substantial justification, without violating the Equal Protection Clause, and upon the determination of such a violation, the state is afforded the first opportunity to remedy any constitutional infirmity. Conspicuously in *VMI I*, there was no substantial justification for Virginia's not providing a VMI-type education for women. Thus, demand for such an institution or program was not an issue and was never before the court in *VMI I*.

B.

On remand in *VMI I*, Virginia remedied the constitutional deficiency by creating a parallel educational program substantially analogous to that of VMI at Mary Baldwin College. Thus was born the Virginia Women's Institute for Leadership (VWIL). *See United States v. Commonwealth of Virginia*, 852 F.Supp. 471, 476 (W.D.Va.1994). Appreciating the pedagogical values of single-gender education, *id.* at 475-76, the duty of Virginia to provide a VMI-style education for women, *id.* at 474, the substance and merit of the VWIL program, even though its methodology differed from VMI, *id.* at 476-81, as well as Virginia's commitment to ensure the success of VWIL, *id.* at 483-84, the district court concluded that the VWIL program did not offend the Equal Protection Clause, *id.* at 484.

We affirmed the district court's approval of VWIL and remanded the case to the district court so that it could oversee implementation of the remedy. *See United States v. Virginia* (*VMI II*), 44 F.3d 1229 (4th Cir.1995). In *VMI II*, our task was to determine generally whether the parallel program was constitutionally sound and to determine specifically whether the VWIL program was substantively comparable to VMI. Applying the intermediate level of scrutiny announced in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982), we concluded that VWIL satisfied the Equal Protection Clause. First, we explained that single-gender education is beneficial, justifiable, and thus fulfills a legitimate and important state objective. *VMI II*, 44 F.3d at 1237-39. Second, we concluded that the requisite substantial relationship between the objective and the means was present because Virginia instituted a comparable program for women at Mary Baldwin College, thereby satisfying the state's obligation of providing equal protection through the implementation of equal programs at different schools. *Id.* at 1239-41.

In concluding that the VWIL program was substantively comparable, we stated that the Equal Protection Clause did not demand identical programs, nor identical execution of

programs for educating men and women; methodologies may differ. *Id.* at 1240-41. The task force charged with maintaining VWIL concluded that had the VWIL been identical to VMI, there would have been no "significant" interest in such a program and "doubt[ed] that enough women would be interested in a women's VMI to make it work." *Id.* at 1235. Because both VWIL and VMI focused not only on traditional academics, but also on discipline and leadership, we concluded that the Equal Protection Clause was not offended by VWIL, although it differed from VMI, because, while "[t]he mechanism for achieving these goals differ[ed], ... the difference [was] attributable to a professional judgment of how best to provide the same opportunity." *Id.* at 1240-41. Although the focus of *VMI II* was one of remedy, implicit in *VMI II* is the fact that there must be demand for a particular educational program, and making this determination necessarily involves questions of expenditure of state resources.

III.

A.

Applying our precedents, The Citadel's male-only policy does not fail to pass constitutional muster. The Citadel has maintained steadfastly, consistently, and correctly so, that there is no demand for a Citadel-type educational program for women. *See Faulkner*, 858 F.Supp. at 560, 564. The record more than adequately supports this position; indeed, Faulkner conceded this point, and the district court found it as a fact. There is simply and indisputably *no* demand in South Carolina for a Citadel-type educational program for women. For instance, Robert Gallagher, Chairman of the State Commission for Higher Education, testified that no institution or individual has come to the Commission seeking to establish either a single-gender program or institution for women similar to that of The Citadel. Buttressing this testimony, former Governor Edwards of South Carolina not only testified that there was no demand for a Citadel-type institution or program

for women, but that South Carolina maintains a policy of aiding women with higher education by providing grants and tuition stipends. Thus, there is substantial justification for South Carolina's excluding Faulkner from entering the Corps of Cadets. While the law does not require a futile act, *see L.K. Comstock & Co. v. United Eng'rs & Constr.*, 880 F.2d 219, 232 (9th Cir.1989), that is precisely what the majority is compelling South Carolina to perform. The absence of demand is a sufficient justification for not providing women a Citadel-type institution. In *VMI I*, we anticipated the vitality of such a justification, expressly observing that a state can have a substantial justification for its classification; and in *VMI II*, we observed that the Equal Protection Clause was not violated if there was "significant" interest in VWIL and there was no interest in a women's program identical to VMI. Unlike the Commonwealth of Virginia in *VMI I*, the State of South Carolina demonstrated a substantial justification for the male-only policy at The Citadel—lack of demand for a Citadel-type institution for women. To compel a state, laboring under limited financial resources, to institute such a program is not only economically repugnant, but also turns the federal judiciary into a super-commission on higher education, apparently charged with superior knowledge and powers of deciding public educational policies, as well as state fiscal policies. Apart from being an unwarranted, improper intrusion into state affairs, *see Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152, 158 (4th Cir.1992), this resurrects the infamous ghoul of *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (holding unconstitutional a New York statute providing that no employee will work in a bakery more than sixty hours in any week or more than ten hours in any day), which, although in the context of substantive due process analysis, has been discredited as an example of the Court's usurpation of power of the local legislature, *see, e.g., Olsen v. Nebraska*, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305 (1941) (repudiating *Lochner* analysis). As the Court subsequently explained, "if our recent cases mean anything, they leave debatable issues as respect business, economic, and so-

cial affairs to legislative decisions. We could strike down this law only if we returned to the philosophy of the *Lochner, Coppage [v. Kansas*, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915)] and *Adkins* [*v. Children's Hospital*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923)] cases." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425, 72 S.Ct. 405, 408, 96 L.Ed. 469 (1952). Although purporting to eschew the contention, *VMI II*, 44 F.3d at 1236, the majority is engaging in substantive equal protection analysis, and reading substance into the Fourteenth Amendment has been consistently repudiated, *see, e.g., Bowers v. Hardwick*, 478 U.S. 186, 194-95, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986).

Faulkner's assertion that The Citadel did not attempt to determine the demand for a parallel program is without merit and belied by the record. The uncontradicted testimony established that South Carolina requires a demonstrated demand as a condition for funding existing and proposed institutions of higher learning, a valid and compelling state interest. Gallagher testified that no institution or individual has sought to establish a Citadel-type institution or program for women. Furthermore, former Governor Edwards testified that there was no demand for a Citadel-type institution or program for women. Faulkner cannot escape the conclusion that lack of demand is a gender-neutral, noninvidious, substantial justification for The Citadel, in order to preserve its unique educational experience, to remain all-male. In my opinion, South Carolina must maintain the autonomy in deciding how to allocate its finite resources, and this principle is particularly salient here because, as all parties and the district court agree, there is absolutely no demand for a "female Citadel," *see Faulkner*, 858 F.Supp. at 560, 564, but, under the majority's decision, South Carolina will be compelled to create one, a remedy that is doubly futile because Faulkner has repudiated both remedies, *i.e.*, a parallel program similar to VWIL and a "female Citadel." Because South Carolina has not defaulted on its burden of demonstrating a substantial justification for not providing a Citadel-type institution for women, the Equal Protection Clause is not offended.

B.

Throughout this litigation, Faulkner has represented vehemently that she does not want a Citadel for women or a parallel program such as VWIL. Rather, her sole purpose is to gatecrash her way into the Corps of Cadets, contending that any single-gender program is *per se* unconstitutional. In addition to being contrary to established law, *see, e.g., VMI II*, 44 F.3d at 1236-38; *Faulkner I*, 10 F.3d at 230-32; *VMI I*, 976 F.2d at 895-97, this assertion fails to perceive the substantive-comparability component of *VMI II* in which we recognized that different methods can be used to achieve similar goals. Here, Faulkner does not want a "female Citadel," contending that the nature of The Citadel experience cannot be replicated. She wants to join the Corps of Cadets because it can provide her with a unique educational experience, but, as all parties agree, the unique experience provided by The Citadel is grounded in its single-gender status. By joining the Corps of Cadets, Faulkner, again as all agree, would be destroying the very uniqueness that makes the Corps of Cadets the *heart* of The Citadel. By getting her wish, Faulkner destroys that which she seeks to attain.

The history of this litigation raises serious questions as to whether Faulkner is content with destroying the unique nature of The Citadel. It could be suggested Faulkner is far more interested in the publicity, notoriety, and purchasable opportunities of being the first female admitted to the Corps of Cadets, as opposed to a sincere desire to seek and obtain the type of discipline and leadership training afforded by The Citadel. For instance, Faulkner spearheaded a fundraiser in which she sold photographs of herself purportedly to defray her legal expenses. *See Senator to Join Rally for Faulkner*, The State, Mar. 17, 1995. Additionally, Faulkner—improperly—donned the jacket of a cadet while making a speech to raise money for her cause. *See* Leah Garchik, *Dressing Well?*, S.F. Chron., Nov. 21, 1991, at D16. Publicity, not equal protection of the law, seems to be the hallmark of Faulkner's creed.

IV.

I cannot accept the majority's invitation to be a party to the destruction of a venerable institution that, as the majority recognizes, provides a pedagogically justifiable, unique educational experience which is attributed to its single-gender status. The majority finds a violation of the Equal Protection Clause without addressing South Carolina's substantial justification for not providing a Citadel-type institution or program for women. Disappointingly, the majority reaches this conclusion in the wake of an absolute absence of demand for such a program. I would reverse the district court's holding that The Citadel's male-only status violated the Equal Protection Clause and consequently its specific remedy of ordering Faulkner admitted to the Corps of Cadets and its general remedy of coeducation at The Citadel.

APPENDIX B

Findings of Fact, Conclusions of Law and Order
United States District Court
District of South Carolina

858 F. Supp. 552

Shannon Richey FAULKNER, Individually
and on behalf of all others similarly situated, Plaintiff,
and
the United States of America, Plaintiff-Intervenor,
v.
James E. JONES, Jr., Chairman, Board of Visitors of
The Citadel, et al., Defendants,

Civ. A. No. 2:93-488-2.

United States District Court,
D. South Carolina,

July 22, 1994.

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

HOUCK, Chief Judge.

The Citadel, the Military College of South Carolina, was established by the State of South Carolina in 1842. Since that time the school's primary mission has been "to educate male undergraduates as members of the South Carolina Corps of Cadets (Corps or Corps of Cadets) and to prepare them for post-graduate positions of leadership through academic programs of recognized excellence supported by the best features of a disciplined military environment."[1] No women have ever been admitted to the Corps of Cadets, and Shannon Richey Faulkner (Faulkner) is the first of her sex to have her applica-

---

[1] Bulletin of The Citadel, Catalogue Issue 1993-1994, p. 12.

tion processed. Her application to be admitted to the Corps in the Fall of 1993 was initially accepted, but then rejected when The Citadel learned that she is a woman. The plaintiff on March 2, 1993, then instituted this action against the members of the Board of Visitors of The Citadel, Wallace I. West, Jr., Director of Admissions and Recruiting at The Citadel, and Claudius E. Watts, III, President of The Citadel, claiming that the males only admission policy of The Citadel denies her equal protection of the laws guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In her complaint Faulkner seeks a permanent injunction against the defendants from discriminating against her on the basis of sex and requiring her immediate admission to The Citadel's Corps of Cadets.

On June 7, 1993, the United States of America was permitted to intervene as a plaintiff, and the State of South Carolina, The Citadel, and The Citadel's Board of Visitors were added as defendants. The government also challenges the failure of The Citadel to admit women to the Corps and asks that said practice be enjoined so that all qualified women will be allowed to be members of the Corps of Cadets.

At the same time this action was getting underway, there was pending in the United States District Court for the Western District of Virginia a closely related case instituted by the United States of America against Virginia Military Institute. Virginia Military Institute is also a public institution of higher learning open only to males whose primary mission and educational methods are almost identical to The Citadel's, and the government's suit against that institution challenged the constitutionality of its males only admission policy and raised the identical issues presented in the instant litigation.[2] In deciding *VMI*[3] the Fourth Circuit Court of Appeals reached the following conclusions:

---

[2] It now appears that the only important difference between the two cases is that in this one we have a real, live plaintiff who, but for her sex, would probably be a member of the Corps of Cadets. In the case against the Virginia Military Institute the government is the only plaintiff.

[3] *U.S. v. Commonwealth of Va.*, 976 F.2d 890 (4th Cir.1992) (*VMI*).

> (1) single-gender education, and VMI's program in particular, is justified by a legitimate and relevant institutional mission which favors neither sex;
>
> (2) the introduction of women at VMI will materially alter the very program in which women seek to partake; and
>
> (3) the Commonwealth of Virginia, despite its announced policy of diversity, has failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women.

VMI, 976 F.2d at 899. The Fourth Circuit then remanded the case to the district court so that it could "require the defendants to formulate, adopt, and implement a plan that conforms with the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 900.

On May 28, 1993, the plaintiffs filed a motion for summary judgment in this action. In that motion they claimed, in essence, that the law of *VMI* applied to this case and that discovery had established without question that the only way the defendants can remedy the violation of Faulkner's constitutional rights is to admit her to the Corps of Cadets. The plaintiffs, therefore, ask that the court issue an order requiring the defendants to admit Faulkner to the Corps without delay.

In response to said motion the defendants agree that *VMI* applies to this case, but they claim that, unlike Virginia, South Carolina can justify the all male admissions policy of The Citadel by articulating an important policy that substantially supports offering the unique benefits of a Citadel-type education to men and not to women.[4] The defendants, therefore, argue that Faulkner's constitutional rights have not been violated and no remedial action is necessary.

---

[4] The articulation of such a policy, for the sake of brevity, has been called "justification" by the court and attorneys in this matter and may from time to time be referred to in such a manner herein.

In light of this, the court saw no reason to retry all of the issues addressed in *VMI*. Instead, it chose to try only justification, the only issue that the defendants claim separates them from *VMI*, and remedy, the only issue that remains if *VMI* does apply.[5]

The trial of those two issues commenced on May 16, 1994, and concluded on May 27, 1994. Subsequently, the parties filed their final briefs and other supporting documents with the court and final arguments were heard. The court has now given careful consideration to the trial evidence and all other matters appropriately before it and pursuant to Rule 52 of the Federal Rules of Civil Procedure now publishes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Faulkner is a 19 year old female who is a resident and citizen of the State of South Carolina. Her home is in Powdersville, South Carolina, where she attended Wren High School and was a 1993 honor graduate. In January 1993, Faulkner applied to be admitted to the Corps of Cadets at The Citadel. She was thereafter advised by Citadel officials that her application had been provisionally accepted and that full acceptance was contingent upon her completion of all high school courses and the submission of a final high school transcript and certain medical and drug testing information. On February 10, 1993, The Citadel wrote Faulkner a letter revoking its acceptance of her application and advising her that she would not be admitted to the Corps of Cadets because of her sex.

---

[5] By accepting the holdings of *VMI* as we do herein, we give the defendants the benefit of the doubt. We find that proper in considering the plaintiffs' motion for summary judgment, but it should be clearly noted that this does not preclude the plaintiffs from raising all of the *VMI* holdings herein accepted and retrying the same if this order is reversed or if the same is otherwise warranted. The plaintiffs accept *VMI* only for purposes of their motion for summary judgment.

2. The defendants admit that, except for her sex, Faulkner is qualified to be a member of the Corps of Cadets.

3. There are twelve public colleges and universities in South Carolina offering four-year degree programs. These institutions are separate and distinct institutions with each having a separate board of trustees or visitors. The University of South Carolina also maintains five two-year regional campuses, and the State of South Carolina provides fifteen public technical colleges within the state.

4. The public institutions of higher learning in South Carolina are located throughout the state, and all citizens of the state have easy and convenient access to one or more institutions. There is considerable duplication in program offerings among the public institutions, but each has its unique features, and the diversity between the institutions and their locations makes each a different experience.

5. All of the institutions of higher education maintained by the State of South Carolina are coeducational except The Citadel. Only Winthrop University and Clemson University have been single-gender institutions in the past fifty years.

Clemson University was founded in 1889 as a land grant college. It was originally an all-male agricultural and military school, but in 1955 Clemson's Board of Trustees voted to drop its military component and become coeducational. It has remained coeducational since that time. There is no indication that single-sex education as such played any role in Clemson becoming coeducational. That decision resulted from the realization by the Clemson Board of Trustees that the school would not grow with the State of South Carolina and adequately serve the educational needs of its citizens if it remained a single-sex military college.

Winthrop University was first established in Columbia, South Carolina, by Dr. David Bancroft Johnson as the Winthrop Training School for Teachers in 1886. In 1891 it became a public state supported college known as the South Carolina Industrial and Winthrop Normal College. In 1895 the institution was moved to its present location in Rock Hill, South Carolina, and in 1920 its name was changed to Winthrop College, the South Carolina College for Women. Its charter

from the State of South Carolina permitted the admission of women only, and it did not become coeducational until 1974. One of the reasons the Winthrop Board of Trustees chose to become coeducational was its declining enrollment. There is, however, no evidence in the record to support a conclusion that Winthrop University could not have survived as a single-sex female institution. In fact, there is no indication that the need or value of single-sex education for women was even considered in the decision making process. Clearly, Winthrop University did not become coeducational to discriminate against women. The primary reason behind Winthrop University going coeducational was the desire of its Board of Trustees to better serve the educational needs of the citizens of South Carolina and particularly those within its geographical area by providing better programs, better faculty and better facilities.

6. The Citadel, the Military College of South Carolina, was established by an Act of the General Assembly in 1842. The Citadel originally occupied the old state arsenal, named the Citadel, on Marion Square in the City of Charleston but moved to its present site on the Ashley River in 1922.

The unique feature of The Citadel is the requirement that all undergraduate day students be members of the South Carolina Corps of Cadets, subject to military discipline at all times, and enrolled in programs of study which qualify graduates for commissions in the active or reserve armed forces. The Citadel is also unique in that it is the only public institution in South Carolina which offers single-gender education to its students by admitting only males to its Corps of Cadets. The type of education available at The Citadel is not available at any other institution in South Carolina.

The primary mission of The Citadel is to "educate male undergraduates as members of the South Carolina Corps of Cadets and to prepare them for post-graduate positions of leadership through academic programs of recognized excellence supported by the best features of a disciplined military environment." Bulletin of The Citadel, Catalogue Issue 1993-1994, p. 12. The purpose of The Citadel's military environ-

ment is "to provide the best qualities of a military and disciplined environment to support the growth and development of character, physical fitness and moral and spiritual principles, thereby preparing its students to meet the requirements of citizens and especially of leaders." *Id.* at 13.

In its day program, The Citadel offers a comprehensive range of baccalaureate degree programs including those in the humanities, the natural and social sciences, and letters and professional degrees in education. The Citadel also offers the only baccalaureate degree in engineering in the low country of South Carolina. Only members of the Corps of Cadets may participate in the day program.

The Citadel accepts transfer students into its Corps of Cadets. Students transferring into the Corps of Cadets may do so as late as the first semester of their junior year.[6] Those students transferring into the Corps of Cadets must complete a full year in the Fourth Class System regardless of the number of academic credits transferred.

The Citadel offers a coeducational night program offering baccalaureate degrees in some, but not all, of the areas offered through its day program. Members of the Corps of Cadets are not permitted to take part in the night program. The night program at The Citadel has no military component. The Citadel offers coeducational day and night summer programs, but The Citadel's Corps of Cadets is not operational during the summer programs.

While ultimate authority for The Citadel rests with the South Carolina General Assembly, the Legislature has delegated authority to The Citadel's Board of Visitors to decide the institution's admission policy.

---

[6] "To be eligible for graduation, all students, including transfer students from other colleges, are required to earn at The Citadel a minimum of one-half the semester hours prescribed for the major course of study." Defendant's Exhibit 226, p. 26. In addition, all students in the Corps of Cadets must complete a ROTC course every semester in which he is enrolled in the Corps or for eight semesters to be eligible for graduation. Defendant's Exhibit 226, p. 27. These requirements cannot successfully be completed beyond the first semester of the junior year.

The Citadel's Board of Visitors consists of eleven people. In addition, Governor Carroll A. Campbell, Jr., Adjutant General T. Eston Marchant, and State Superintendent of Education Barbara S. Nielsen are all Ex-Officio members of The Citadel's Board of Visitors.

The Citadel's Board of Visitors is comprised completely of alumni who were members of the Corps. The South Carolina Attorney General issued an opinion in 1990 wherein he ruled women graduates of The Citadel's night program were eligible for membership on the institution's Board of Visitors. 1990 Op.Atty.Gen. No. 90-18. Currently there are no women on The Citadel's Board of Visitors, and no women have ever served on The Citadel's Board of Visitors.

7. When Winthrop University and Clemson University were single-sex institutions, the State of South Carolina funded them. Likewise, throughout its history as an institution that admits only males to its Corps of Cadets, The Citadel is supported primarily by the taxpayers of South Carolina.

8. There are also approximately twenty four-year private colleges in South Carolina. All of those institutions are coeducational except two. Converse College in Spartanburg, South Carolina, and Columbia College in Columbia, South Carolina, admit only women.

9. South Carolina has a tuition grants program which provides money to male and female students who meet certain requirements and choose to attend a private institution of higher learning within the State of South Carolina. In addition to certain minimal requirements, the Commission on Tuition Grants adjusts the amount of grant based on need, parental income and other scholarships received. Of the Six Hundred Fifty Million ($650,000,000.00) Dollars appropriated by the State of South Carolina in 1993 for higher education, Seventeen Million ($17,000,000.00) Dollars was awarded in tuition grants. South Carolina does not directly give tuition grant money to the private institutions. The tuition grants are awarded to the individual and not to the private schools. Six thousand six hundred and six students received such grants

in the average amount of Two Thousand Five Hundred Twenty-nine ($2,529.00) Dollars in 1993.

10. The South Carolina State Commission on Higher Education (Commission) is charged with the duty of evaluating the State's institutions of higher learning with regard to those schools' short-term and long-term goals. As explained by the chairman of the Commission on Higher Education, Robert C. Gallager, the Commission is a coordinating board, not a governing board. Its charge is to approve individual institutional budgets or lump sum appropriations and make recommendations for appropriations to the South Carolina General Assembly. The Commission also approves all institutional facilities regardless of where the funding for them comes from and all programs which are added or deleted.

In 1979 the Commission did a Master Plan for Higher Education in South Carolina (Master Plan). The primary goal for post-secondary education in South Carolina as established by the 1979 Master Plan is to "provide the opportunity for learning beyond the secondary school level for all who need or seek it." Defendant's Exhibit 420A, p. 209. In order to accomplish that goal, the Commission recognized a need for an "appropriate diversity of programs to meet a wide range of needs." *Id.* Additionally, the Commission recognized a need for planning to "assure optimum use of the public's resources available" for post-secondary education. *Id.*

Other goals of the Commission as established in its 1979 Master Plan are as follows:

a. To provide the opportunity for learning beyond the secondary Level for all who need or seek it;

b. To reduce socio-economic barriers to post-secondary education;

c. To assure the most effective and efficient use of all resources;

d. To improve the quality of post-secondary education;

e. To encourage research activity within post-secondary education;

f. To make better use of the resources of post-secondary education in public service;

g. To achieve and sustain among the citizens of the state an appreciation for the accomplishments of post-secondary education and an understanding of its commitment to improving the quality of life;

h. To preserve a strong non-public sector of post-secondary education; and

i. To work cooperatively with all segments of education. *Id.* at 248-250.

The Commission has published follow-up reports to its Master Plan annually since 1979 wherein the Commission follows South Carolina's progress in attaining the goals established in 1979.

The Commission also published a Program for Access and Equity in South Carolina Higher Education in 1988 at which time it reaffirmed South Carolina's commitment to "the full participation of all citizens in higher education on an equitable basis." Government's Exhibit 69, p. i. The program for access and equity was designed predominately to deal with the underrepresentation of African-Americans in higher education in South Carolina, but it goes without saying that the goals of the program are equally applicable to women. One of the basic concepts of South Carolina's system of higher education is autonomy and independence of individual institutions. As part of this autonomy, each institution's board of trustees is charged with developing the institution's mission and admission policy. The Commission recognizes the need for each institution to continue to have autonomy in mission selection and admission policies but recommended that the two should remain consistent. While the public institutions in South Carolina are given autonomy to choose their missions and admission policies, the Commission is charged with overseeing that the system works cohesively. As a part of that duty, the Commission has set a goal to include "an appropriate diversity of programs to meet a wide range of needs...." Defendant's Exhibit 420A, p. 209. The Commission has also focused its attention on planning so that the system of higher education uses the public's resources in the optimum way.

11. At one time the State of South Carolina required that only women be admitted to Winthrop. Otherwise, however, the South Carolina General Assembly has played no active role in deciding the missions of the individual institutions in this state. It does, however, control them in the sense that the South Carolina General Assembly elects their governing bodies and controls the purse strings that permit them to survive.[7]

12. Diversity as the term refers to post-secondary education in South Carolina refers to diversity of educational programs or different kinds and types of programs, including two-year programs versus four-year programs and single-gender versus coeducational. In compliance with this policy of diversity, South Carolina has established a variety of diverse educational post-secondary institutions ranging from small colleges to large regional universities, from liberal arts programs to specific research-based programs, from two-year institutions to four-year institutions with no graduate programs to four-year institutions with comprehensive graduate and professional schools. Diversity of education in South Carolina also refers to geographical location of the individual institutions, including rural versus urban campuses and small versus large campuses. With institutions located in all areas of the State South Carolina accomplishes its goal of making higher education convenient to all of its citizens.

13. The allocation of the state's resources for higher education has always been an issue of concern for the South Carolina General Assembly. The South Carolina General Assembly seeks to get the maximum benefit in education for its dollars. As a result, the state has tried to implement educational programs as the demand for such programs arises. The demand for certain programs in South Carolina is determined in various ways, including a need to fill vacancies in certain job areas or a large amount of interest in certain programs which the institution learns about and conveys to the Commission.

---

[7] Clemson is somewhat different in the way its governing body is selected, but that does not diminish the state's control of that institution.

The Commission has no mechanisms itself for determining the demand by its citizens for a particular program.

Demand is not the sole criterion for implementing new programs in South Carolina. Necessity for certain programs is sometimes substituted for demand. In addition, South Carolina has also attempted to allocate resources effectively by entering into compact arrangements with other states for certain programs such as veterinary medicine and optometry not offered to any students in this state. South Carolina is also a member of the Academic Common Market which fills the needs of certain students who seek other unique courses of study not offered to any students in this state.

14. On May 20, 1993, the South Carolina General Assembly adopted Concurrent Resolution 4170 (Concurrent Resolution or Resolution).[8] Prior to the 1993 Concurrent Resolution[9] there were no official governmental statements articulating a policy supporting single-gender education in South Carolina. In that Resolution, however, the State of South Carolina attempts to do just that. It expresses a policy

---

[8] At that time the *VMI* decision had been rendered by the Fourth Circuit Court of Appeals. At least two prominent Citadel alumni had contacted the Speaker of the South Carolina House of Representatives and furnished him a copy of what later became Concurrent Resolution 4170. The conclusion is inescapable that the said Concurrent Resolution was prompted by this litigation and would not have been passed had it not been for this litigation and the Fourth Circuit's decision in *VMI*.

[9] The Fourth Circuit Court of Appeals had the following to say about the Concurrent Resolution of 1993 in *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir.1993):

> A resolution adopted in May 1993 by both houses of the legislature embraced all the positive contributions of The Citadel and reaffirmed a policy of providing its benefits only to males.
>
> While the announced South Carolina policy reaffirms The Citadel's positive contributions, it does not connect these values to a male-only characteristic. Rather, the values

(Footnote continues on following page)

of diversity in education which includes single-sex institutions where there is sufficient demand to support the same, and the governing body of the institution in question desires to implement single-sex programs. The Resolution also creates a committee of ten members "to assist the State of South Carolina in carrying out its responsibilities of providing single-gender educational opportunities for women, and the committee shall formulate recommendations for the South Carolina General Assembly to consider in exploring alternatives for the provision of single-gender educational opportunities for women." It further provides that the committee submit its report to the South Carolina General Assembly at the beginning of the 1994 Session at which time the committee shall be dissolved.

15. The committee called for in the Concurrent Resolution was appointed, organized and met on four occasions. It made its report to the South Carolina General Assembly in January 1994. In that report the committee did not offer the South Carolina General Assembly any definite plan for single-gender opportunities for women in South Carolina. Instead, it offered a list of possible alternatives. Those alternatives considered by the committee were a new public institution for women in South Carolina, a "women's college" within a larger university, a compact arrangement with Mary Baldwin College in Virginia or with Converse College or Columbia College in South Carolina, and an increase in the tuition grants program to provide more money for women to attend single-gender private institutions.

(Footnote continued from preceding page)

stated in the resolution would appear to relate to a single-gender policy for institutions. The resolution also offers no explanation for the failure to offer women the same opportunity to participate in a single-gender institution and achieve similar goals as that afforded to men at The Citadel. Although South Carolina has appointed a committee to review the absence of opportunity for women, the committee will not report to the legislature until January 1994.

The committee did not recommend any particular alternative to the General Assembly and made no effort to determine the cost, the feasibility, or the constitutionality of any of the suggested alternatives. There is no indication that the committee contacted Mary Baldwin College or Converse College about the possibility of a compact arrangement with those institutions. Columbia College advised the committee that it was not interested in such an arrangement.

Though the committee made its report to the General Assembly at the beginning of the 1994 session there is nothing in the record to suggest that the General Assembly gave further consideration to the matter during its 1994 session.

16. It is and has been the policy of the State of South Carolina to provide educational opportunities in its system of higher education when dictated by its policies of responding to reasonable demand, student choice, institutional autonomy, diversity, and economy of resources.

17. In the fall of 1993 there were 32,642 women and 22,831 men enrolled in public institutions of higher education in the State of South Carolina. Approximately 2000 of those students, all male, attended The Citadel, while all others attended coeducational institutions.

The Citadel does not recruit women for the Corps of Cadets and has not through the years kept records for how many women have expressed an interest in attending the institution. In addition, no survey has been conducted to determine how many women are interested in joining the Corps of Cadets or how many women would be interested in pursuing a public single-sex education. In the past year, however, forty-three women have inquired about The Citadel's Corps of Cadets, but the seriousness of their interest has not been determined.

There does not appear to be any substantial interest in South Carolina for the establishment of an all-female military institution like The Citadel. The interest of South Carolina women in attending a Mary Baldwin-type program is unknown. Based on the experiences had at other coeducational military institutions, The Citadel would attract between twenty

and fifty women annually to its Corps of Cadets if it were to become coeducational.

18. The remedial plan tendered by the defendants in the trial of this case sets forth "the remedial options from which they would expect to select and develop a more specific plan to cure any constitutional deficiency in the South Carolina system of higher education, if one should ultimately be found." Defendant's Exhibit 422, p. 2. It does not select any one remedy or even prioritize those suggested. They simply say that "within sixty days of the court's determination of the liability issues, the Defendants will supplement this Remedial Plan by setting forth a specific proposed remedy that responds to the liability determination." *Id.* at p. 8. The specific proposed remedy will be determined on the basis of consultation with experts in women's education and higher education. Apparently, no such consultation has taken place yet, and no effort has been made to determine the feasibility of any specific remedy. Indeed, neither the South Carolina Commission on Higher Education nor the South Carolina General Assembly has been contacted by the defendants concerning the matter.

There is no suggestion by the defendants that the privatization of The Citadel is an available remedy. To the contrary, all indications are that the cost of such a remedy is prohibitive.

It also appears that the defendants have not given consideration to the admission of Faulkner to the Corps of Cadets as a possible remedy. In fact, they have made it clear that their primary objective in this litigation is to keep her out of the Corps.

19. The first step for the implementation of new educational programs in South Carolina's institutions of higher learning usually begins at the institutional level. Once an institution has determined to start a program it must send a letter of intent to the Commission's staff.

The next step is to take the proposal to the Commission on Higher Education for approval. The Commission has "program approval" and "termination approval." The Commis-

sion on Higher Education is charged with approving all lump sum appropriations for institutions in South Carolina and for making a recommendation to the General Assembly.

Within the Commission the program first goes through the staff of the Commission for comments, suggestions, or modifications. The submission then goes to an academic committee of the Commission. If the plan is approved by the academic committee it then goes to the full Commission on a quarterly basis for approval.

After the letter of intent reaches the Commission, it generally takes about one year to get approval depending on the complexity of the program sought and whether it has to go back to the committee or the institution for additional study. If the Commission determines that a program is a core program, it may approve such a program quickly, even with the lack of a large demand.

Once a new program is approved by the Commission on Higher Education, it goes to the South Carolina General Assembly, for funding. According to the Commissioner on Higher Education, there are no funds currently within the budget to begin any new programs in South Carolina, and they have not been available for a number of years.

Funding compact or contract arrangements with sister states is a much less arduous and expensive process than starting a new program. Because compact arrangements are less difficult to get approved, the state could expedite its decision to offer such a compact arrangement and get it through the legislature quickly. The difficulty with compact arrangements is dealing with the private institution. The state must get faculty and board approval which could take anywhere from one to two years.

20. A plan to start a new institution in South Carolina would undergo the most scrutiny by the Commission and would take the most time. Creating a new institution could take up to ten years because of the difficulty in getting a bond bill passed.

21. The *VMI* action was commenced on March 1, 1990, and Judge Kiser rendered his first opinion on June 14, 1991.

The matter was then appealed to the Fourth Circuit Court of Appeals where it was argued on April 8, 1992, and a decision handed down by that court on October 5, 1992. The motion of the defendants for a rehearing was denied by the Fourth Circuit Court of Appeals on November 19, 1992, and certiorari was denied by the United States Supreme Court on May 24, 1993. From the day Judge Kiser filed his opinion to the day judgment became final in the case twenty-one days less than two years was consumed. It is a foregone conclusion that this case will be pursued through every avenue of appeal available. If that process takes as much time as it did in *VMI*, a final judgment in this case will be rendered on June 29, 1996.[10] At that time Shannon Richey Faulkner will have just completed her junior year and will be waiting to begin her senior year. The South Carolina General Assembly will have adjourned *sine die* on June 6, 1996, to reconvene on the second Tuesday in January of 1997.

CONCLUSIONS OF LAW

A. This court has jurisdiction of this case by virtue of 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3). The United States of America properly intervened as a plaintiff pursuant to 42 U.S.C. § 2000h-2.

B. Plaintiffs claim that the admission policy of The Citadel that admits men and excludes women is unconstitutional. The United States Supreme Court has said that the constitutionality of such admission policies, usually called classifications in this context, must be determined under the cannons of the Equal Protection Clause of the Fourteenth Amend-

---

[10] If the Fourth Circuit Court of Appeals grants a motion for rehearing or *en banc* consideration or if the United States Supreme Court grants certiorari, it will take much longer for final judgment in this case to be reached.

ment to the United States Constitution. *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).[11]

C. The Equal Protection Clause provides that "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."[12] While that does not mean that everyone must be treated the same; it does mean that all persons similarly situated shall be treated alike. The Equal Protection Clause obviously does not limit its protection only to sex discrimination. Its reach is much broader than that. In addition, the scrutiny it gives to different types of discrimination is varied.

When one considers the circumstances existing in this country at the time the Fourteenth Amendment was adopted in 1868, it is not surprising that its main concern was the elimination of racial discrimination. That is still said to be its core purpose, and it subjects classifications based on race "to the most rigid scrutiny." *Korematsu v. U.S.*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). "Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272, 99 S.Ct. 2282, 2292, 60 L.Ed.2d 870 (1979). *See also Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964). Conversely, classifications based on social or economic factors receive the lowest level of Fourteenth Amendment scrutiny. They are presumed valid and pass constitutional muster if they are rationally related to a legitimate state interest. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105

---

[11] *Reed v. Reed* states that the statute under consideration there "provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause." 404 U.S. at 75, 92 S.Ct. at 253.

[12] The defendants are all clearly state actors and subject to jurisdiction under the Equal Protection Clause. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938).

S.Ct. 3249, 87 L.Ed.2d 313 (1985). A classification based on sex, the type involved in this case,[13] is subjected to greater Fourteenth Amendment scrutiny than that imposed on social or economic classifications but less than that directed at alleged racial discrimination.[14] It falls somewhere in between those two extremes and is thus called intermediate scrutiny. The United States Supreme Court in the case of *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982), defined the rule applicable to this case as follows:

> Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. *Kirchberg v. Feenstra*, 450 U.S. 455, 461 [101 S.Ct. 1195, 1199, 67 L.Ed.2d 428] (1981); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 [99 S.Ct. 2282, 2293, 60 L.Ed.2d 870] (1979). The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 [100 S.Ct. 1540, 1545, 64 L.Ed.2d 107] (1980).

---

[13] It is important to note that the sexual classification involved in the instant case is *facially* discriminatory and the law evaluates such a classification somewhat differently from a *facially* neutral classification, such as a height and weight employment standard, that has a disproportionate impact upon men or women applicants. *See De La Cruz v. Tormey*, 582 F.2d 45 (9th Cir.1978).

[14] We accept this as existing law even though Justice Ginsburg, in the case of *Harris v. Forklift*, — U.S. ——, ——, 114 S.Ct. 367, 372, 126 L.Ed.2d 295 (1993), states that "it remains an open question whether classifications based upon gender are inherently suspect."

D. All classifications based on sex are not unconstitutional. The law recognizes that there are some real differences between men and women and permits different treatment that provides a legitimate accommodation for those differences. What the law will not allow, however, is classifications based on fixed notions, archaic and stereotypical notions, concerning the relative roles and abilities of females and males.

In most cases, therefore, our constitutional analysis of the policy in question would now turn to a careful consideration of the underlying reasons why The Citadel admits men and not women to its Corps of Cadets. Because of the considerable deference given to *VMI* herein, our course is not, however, the usual one. *VMI* has considerably reduced the scope of our inquiry, and we must now look to that case and its teachings and define the precise impact it has on our constitutional analysis in this case.

E. The three principal conclusions reached in *VMI* and adopted herein are as follows:

> (1) single-gender education, and VMI's program in particular, is justified by a legitimate and relevant institutional mission which favors neither sex;
>
> (2) the introduction of women at VMI will materially alter the very program in which women seek to partake; and
>
> (3) the Commonwealth of Virginia, despite its announced policy of diversity, has failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type education to men and not to women.

VMI, 976 F.2d at 899. The court then remanded the case to the district court for the defendants "to formulate, adopt, and implement a plan that conforms with the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 900. The court also gave the defendants some guidance as to what they might

do to accomplish the purposes of the remand. In that regard, it had the following to say:

> [W]e remand the case to the district court to give to the Commonwealth the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied. Consistent therewith, the Commonwealth might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution. While it is not ours to determine, there might be other more creative options or combinations.

VMI, 976 F.2d at 900.

By accepting the aforementioned law of *VMI* in this trial we have, in essence, invited the defendants to articulate an important policy that substantially supports offering the unique benefits of a Citadel-type education to men and not to women. If they can do so, they have satisfied the requirements of the Equal Protection Clause. If they cannot, they will be held, just as VMI and the Commonwealth of Virginia were, to have violated the Fourteenth Amendment by The Citadel's males only policy.

E. The State of South Carolina policy's [sic] that the defendants assert justifies the classification in question is expressed as follows:

> S]ingle-gender education in the higher educational system of South Carolina has been and continues to be offered to both men and women in accordance with the well-established and gender-neutral public policies of responding to reasonable demand, student choice, institutional autonomy, diversity, and economy of

> resources. At the present time, the demand for single-gender education for women in South Carolina is fully met by the private women's colleges, Converse and Columbia, whose South Carolina students receive state support through the Tuition Grants Program ... that South Carolina supports single-gender education for both women and men in response to the gender-neutral criterion of demand and that the absence of a public single-gender institution for women at the present time results from insufficient demonstrated demand.

Defendants' Post-Trial Proposed Findings of Fact and Conclusions of Law, p. 2. Based upon the past actions of the State of South Carolina and the expressions of its General Assembly in the Concurrent Resolution of 1993 this court concludes that it is now and has been for some time the policy of the State of South Carolina to provide educational opportunities to its citizens based on reasonable demand, student choice, institutional autonomy, diversity and economy of resources.

F. Simply put, the position of the defendants is that single-sex educational opportunities are not available to women in South Carolina's public system of higher education because there is insufficient demand for them. This justification is very appealing to those who sincerely revere The Citadel and its rich traditions, to those who determine where the scarce resources of this state will be placed, and to the many people, men and women, who live in this state and in undesignated places elsewhere who do not want to see The Citadel change. In a referendum the state's policy may be approved by a landslide, or it may fail. The problem is, this is not a referendum where the emotions and likes and dislikes of the plurality carry the day. It also is not an occasion where one judge votes his will. In this matter the Constitution of the United States alone speaks and determines the outcome of this controversy.

G. The defendants have called the court's attention to no case that supports the proposition that lack of demand is a sufficient justification for the State of South Carolina providing single-sex education to men but not to women. A thorough search by this court has also failed to find any such precedent.

The Equal Protection Clause prohibits a state from denying "any person" within its jurisdiction equal protection of the laws. The rights it protects are personal and individual, and the courts have consistently so held for many years. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938); *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); *Carter v. School Board*, 182 F.2d 531 (4th Cir.1950). To suggest that a lack of demand for a certain type of equal protection can somehow justify the denial of another person's constitutional right thereto undermines the express intent of the Fourteenth Amendment.

Surprisingly, the defendants in their final brief cite the case of *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938) in support of their position. That case arose almost twenty years before *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) and during the time when separate but equal facilities for the races and *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) were the law of the land. The State of Missouri had a law school for whites but did not have one for blacks. In order to provide equal facilities for blacks, therefore, the State of Missouri agreed to pay the tuition of any blacks desiring to go to law school at the law schools of the adjacent states of Kansas, Nebraska, Iowa, and Illinois, all of which permitted blacks to attend their law schools. The plaintiff applied for admission to the law school at the University of Missouri, but the same was denied. He then instituted suit, claiming that the stated policy violated the Equal Protection Clause of the United States Constitution because it failed to provide him, a black, with facilities equal to those provided

whites. The State of Missouri defended the action on the grounds that there was not sufficient demand by blacks for a separate law school which justified it providing one only for whites. The Supreme Court rejected that argument, and in doing so, referred to another leading case on the subject, *McCabe v. Atchison, T. & S.F. Ry. Co.*, 235 U.S. 151, 35 S.Ct. 69, 59 L.Ed. 169 (1914), in the following very pertinent quote:

> Nor can we regard the fact that there is but a limited demand in Missouri for the legal education of negroes as excusing the discrimination in favor of whites. We had occasion to consider a cognate question in the case of *McCabe v. Atchison, T. & S.F. Ry. Co. Supra*. There the argument was advanced, in relation to the provision by a carrier of sleeping cars, dining and chair cars, that the limited demand by negroes justified the State in permitting the furnishing of such accommodations exclusively for white persons. We found that argument to be without merit. It made, we said, the constitutional right "depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privi-

> lege has been invaded." *Id.*, [at] pp. 161, 162 [35 S.Ct. at p. 71].
>
> Here petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.[15]

Missouri ex rel. Gaines, 305 U.S. at 350, 59 S.Ct. at 237.

There is no indication that the United States Supreme Court has done anything to alter in any way whatsoever the legal principal stated in the above quote. To the contrary, it continues to clearly proclaim that those rights created by the Equal Protection Clause of the Fourteenth Amendment are personal, individual rights. *University of California Regents v. Bakke*, 438 U.S. 265, 289, 98 S.Ct. 2733, 2747, 57 L.Ed.2d 750 (1978). Accordingly, the policy of demand advanced by the defendants does not justify the State of South Carolina's policy of providing a Citadel-type education to men and not to women.

H. As has been noted above, the classification under scrutiny here is one that is *facially* discriminatory. Men are permitted to join the Corps of Cadets at The Citadel and women are not. Nothing could *facially* discriminate against women more. In arguing the sufficiency of their policy based on demand, however, the defendants abandon the well recognized constitutional analysis applicable to *facially* discriminatory classifications by sex and attempt to impose on the plaintiffs

---

[15] It is not relevant to the present discussion, but since the defendants have suggested a compact arrangement with Mary Baldwin College in Virginia as a possible remedy in this case, it might be well at this time to note that *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938) also stands for the proposition that such a compact would be unconstitutional.

a more difficult burden of proof reserved for cases where the alleged sexual discrimination arises out of a classification that is not *facially* discriminatory. Pursuant to that argument, the defendants contend that "Faulkner and the United States can establish an equal protection violation only by showing that the South Carolina policy is a product of intentional, invidious discrimination." Defendants' Post-Trial Proposed Findings of Fact and Conclusions of Law, p. 24. In support of that proposition the defendants cite the case of *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). That case involved a Massachusetts statute that gave preferential treatment to veterans applying for state civil service positions. Since there are more male veterans than there are female, it was claimed that the statute discriminated against women and violated the Equal Protection Clause of the United States Constitution. That is clearly a classification that is not *facially* discriminatory and calls for a constitutional analysis far different from the one involved in the instant case. In addition, every case that the defendants cite to support their position that the plaintiffs must prove invidious discrimination in this case involved classifications that were not *facially* discriminatory. The defendants apparently attempt to justify such an approach by somehow claiming that it is not The Citadel's all-male admission policy that is under constitutional attack in this case. Instead, they seem to posit that the reasons behind the coeducation of Winthrop University and the state's failure to otherwise provide an institution of higher learning open only to women is the subject of constitutional scrutiny.[16] Such an argument is

---

[16] The following is quoted from the Trial Transcript, Vol. XX, pp. 114, wherein counsel for The Citadel made the following statement in closing argument:

> But the Winthrop, the decision to allow Winthrop to become co-ed was not based upon gender as such. The legislation itself had no mention of gender. The annual

(Footnote continues on following page)

without merit. The classification that must withstand constitutional examination here is The Citadel's policy of admitting only males to its Corps of Cadets, and to prevail in this case it is not necessary for the plaintiffs to prove that said policy is the result of the State of South Carolina's intent to discriminate against women. *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977); and *Mississippi University for Women v. Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982).

I. The defendants have failed to articulate an important policy that substantially supports offering the unique benefits of a Citadel-type education to men and not to women, and The Citadel's refusal to admit Faulkner to its Corps of Cadets because of her sex violates her constitutional rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

J. Having reached the foregoing conclusion that Faulkner's constitutional rights are being violated, the question of how to remedy that situation must be addressed. At the very beginning of this order it was noted that the primary difference in this case and the one instituted by the United States against Virginia Military Institute is that we have a real, live plaintiff here who wants to be admitted to the Corps of

---

(Footnote continued from preceding page)

> appropriations that the state has given to its colleges made no mention of gender. The Commission on Higher Education policies for approving new programs and evaluating existing programs make no mention of gender.

The policies and specific decisions which led to the state support of an institution for men and not a corresponding institution for women is at least facially gender-neutral, because you can't find a decision or a statute out there that was made based upon gender alone.

Cadets whereas in *VMI* the Department of Justice was the only plaintiff.[17] Because of that difference, the matter of remedy must be looked at from the standpoint of Faulkner and also from the standpoint of other women similarly situated who may seek to join the Corps of Cadets at some future date.

In *Brown v. Board of Education*, 349 U.S. 294, 299, 75 S.Ct. 753, 755, 99 L.Ed. 1083 (1955) (*Brown II*) the United States Supreme Court held that local school authorities have "the primary responsibility for elucidating, assessing and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."[18] If the local authorities fail in their responsibility to remedy the constitutional deprivation "judicial authority may be invoked" for that purpose. *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971). Once the power of the court is invoked "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedy." *Id.*

---

[17] When it had this case before it at the preliminary injunction stage, the Fourth Circuit Court of Appeals noted that difference by the following statement quoted from *Faulkner*, 10 F.3d at 233:

> Denying Faulkner's access, on the other hand, might likely become permanent for her, due to the extended time necessary to complete the litigation. The most telling aspect of this case, and that which distinguishes this case from *VMI*, is the presence of this time pressure, combined with an absence of present opportunity for Faulkner.

[18] In remanding *VMI* as it did the Fourth Circuit Court of Appeals did not mention *Brown II* by name, but it obviously considered the rule of that case applicable. At least one judge sitting on the panel that heard the preliminary injunction appeal in this case also considers *Brown II* controlling on the issue of remedy in this case. The issue of remedy herein will, therefore, initially be viewed in the light of *Brown II*.

It appears clear that the defendants thought that they would have the primary responsibility for devising a remedy if they were found to have violated Faulkner's constitutional rights. Indeed, the Concurrent Resolution of 1993 passed by the South Carolina General Assembly on May 20, 1993, had as its stated purpose the creation of a committee to "formulate recommendations for the General Assembly to consider in exploring alternatives for the provision of single-gender educational opportunities for women" and to report its recommendation to the General Assembly in January 1994. When it appeared to this court in February 1994, that this case was ready for trial, it assumed that, since the defendants had been considering the matter of remedy for almost a year, substantial strides had been made towards that goal. When the court set a trial date of May 18, 1994, therefore, it included within the issues to be tried that of remedy. At trial it became clear that nothing of substance had been done by the defendants towards fashioning a remedy. The committee met four times, made a report to the South Carolina General Assembly and was dissolved by operation of law. The South Carolina General Assembly adjourned its 1994 session without considering the matter of single-sex education for women further. Consequently, there is nothing before the court at this time that permits it to determine what the defendants will do or can do to guarantee to the plaintiff her constitutional rights under the Equal Protection Clause. Not a single defendant signed the proposed remedial plan or testified in court as to their intentions or desires in regard thereto. All the court has is a document signed by the attorneys representing the defendants stating that within sixty days after liability is determined in this case the defendants will set forth a specific proposed remedy.

To place the matter of remedy in proper perspective, the manner in which the case has been conducted should also be taken into consideration. The Citadel has made no secret of the fact that its primary goal in this case is to keep Faulkner out of the Corps of Cadets, and the State of South Carolina appears ready to give its support to that cause. Not once has

a defendant done anything to indicate that it is sincerely concerned to any extent whatsoever about Faulkner's constitutional rights. The most revealing fact of all, however, is that the defendants have continued to defend this case at a cost of millions of dollars to the taxpayers of South Carolina when they do not have a single case to offer in support of their position that a lack of demand for single-sex education on the part of women justifies its providing such an education only for men.

Time is not on the side of Faulkner. She is now a rising sophomore and cannot become a member of the Corps of Cadets after the beginning of her junior year. The Fourth Circuit in *VMI* enumerated three ways that women could be provided equal protection in that case but suggested that there might be more creative options or combinations. No such options or combinations have surfaced in this case, and there remain only three avenues through which Faulkner can receive the rights guaranteed to her under the Equal Protection Clause. Admittedly, The Citadel cannot go private, and that leaves only two options remaining. One of those is a parallel institution or program, and the other is admission to the Corps of Cadets.

The defendants have almost total control over the development and implementation of a parallel institution or program. They alone can develop it, and they alone can fund it. In addition, it is clear that they can easily delay that process beyond the point in time that Faulkner would ever benefit from such a program. Throughout the pendency of this action the defendants have done nothing to indicate that they would be inclined to hasten that process. To the contrary, all of the actions witnessed by this court clearly and unequivocally indicate that the defendants would exert all of their considerable influence to insure that Faulkner would never have the opportunity to enroll in such a parallel institution or program.

Under the circumstances existing in this case, the court thus concludes that the only adequate remedy available to provide the plaintiff the rights guaranteed to her by the Equal

Protection Clause is her immediate admission to the Corps of Cadets at The Citadel.[19]

K. This court has considered the issue of remedy for Faulkner within the context of *Brown II*. It has done so even though it has reservations about the applicability of that case and its progenies.

As *Brown II* dictates the United States Supreme Court has in many cases said that the court should first look to the state for a remedy to a constitutional deficiency before imposing its own. It has followed that rule in cases involving school desegregation, reapportionment, defects in election processes, prison overcrowding, and others. It has also recognized that there are some violations of the Fourteenth Amendment that do not require such a procedure. *Watson v. City of Memphis*, 373 U.S. 526, 83 S.Ct. 1314, 10 L.Ed.2d 529 (1963), is a case that falls into such a category and expresses a rule of remedy that seems to more clearly fit the facts and needs of this case than does that of *Brown II*.

Watson is a case where the plaintiffs sought immediate injunctive relief desegregating the municipal parks and recreational facilities of the City of Memphis, Tennessee. The defendants asked for additional time to desegregate. In addressing the applicability of *Brown II* the court had the following to say:

> This case presents no obvious occasion for the application of Brown. We are not here confronted with attempted desegregation of a local school system with any or all of the perhaps uniquely attendant problems, administra-

---

[19] At the conclusion of the trial of this case on May 27, 1994, the court asked the parties to submit a plan for admitting Faulkner to the Corps of Cadets if it imposed that as a remedy. Plaintiffs and defendants have responded, and the court shall forthwith conduct an evidentiary hearing to consider those plans and other pertinent matters with a view towards promptly issuing another order detailing the particulars of Faulkner's admission to the Corps.

> tive and other, specified in the second Brown decision as proper considerations in weighing the need for further delay in vindicating the Fourteenth Amendment rights of petitioners. Desegregation of parks and other recreational facilities does not present the same kinds of cognizable difficulties inhering in elimination of racial classification in schools, at which attendance is compulsory, the adequacy of teachers and facilities crucial, and questions of geographic assignment often of major significance. Most importantly, of course, it must be recognized that even the delay countenanced by Brown was a necessary, albeit significant, adaptation of the usual principle that any deprivation of constitutional rights calls for prompt rectification. The rights here asserted are, like all such rights, present rights; they are not merely hopes to some future enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.

Watson, 373 U.S. at 531, 83 S.Ct. at 1318. There are other cases with facts more similar to those involved here that stand for the same proposition. *State of Florida v. Board of Control*, 351 U.S. 915, 76 S.Ct. 693, 100 L.Ed. 1449 (1956); *Meredith v. Fair*, 305 F.2d 343 (5th Cir. 1962).

The *Meredith* case is an interesting one to read. It brings back memories of another world and a way of life that many of us find difficult to believe ever existed. It is also evidence of the fact that many of the sentiments and tactics prevalent in that time have, to some extent, again surfaced in this case. The *Meredith* case, however, is not cited for those reasons. It is referred to because it stands for the proposition that *Brown II* and its requirement that discrimination be removed with

"all deliberate speed" is inapplicable to a situation such as the one at hand. It speaks directly to the situation Faulkner is now in:

> As a matter of law, the principle of 'deliberate speed' has no application at the college level; time is of the essence. In an action for admission to a graduate or undergraduate school, counsel for all the litigants and trial judges too should be sensitive to the necessity for speedy justice.

Meredith, 305 F.2d at 352. This court concludes that this is the proper rule to apply in fashioning a remedy for Faulkner. It, of course, also requires her admission to the Corps of Cadets.

L. The question of a remedy for Faulkner is critical. Such is not the case for other qualified women who may wish to attend The Citadel. No other women have asked to be admitted to the Corps of Cadets, and with the new school year only a few weeks away, The Citadel could not be expected to now process any applications for admission this year. The proposed remedial plan of the defendants should be given an opportunity to proceed. It may be able to provide an adequate remedy for any constitutional grievances future female applicants to The Citadel may have. But a plan that conforms with the Equal Protection Clause of the Fourteenth Amendment must be formulated, adopted and implemented for the 1995-1996 school year. Otherwise, the court will have no alternative but to require the defendant to admit qualified women who apply in the future to the Corps of Cadets.

ORDER

IT IS, THEREFORE, ORDERED that the defendant forthwith admit Shannon Richey Faulkner to the South Carolina Corps of Cadets under such terms and conditions as this court hereafter orders.

IT IS FURTHER ORDERED that the defendants pursue their proposed remedial plan without delay and formulate, adopt, and implement a plan that conforms with the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States of America by the beginning of the school year 1995-1996.

APPENDIX C

Judgment of the
United States District Court
for the District of South Carolina

Shannon Richey FAULKNER, Individually
and on behalf of all others similarly situated, Plaintiff,
and
the United States of America, Plaintiff-Intervenor,
v.
James E. JONES, Jr., Chairman, Board of Visitors of
The Citadel, et al., Defendants,

Civ. A. No. 2:93-488-2.

United States District Court
D. South Carolina

August 5, 1994

JUDGMENT

This action came on for trial before the Court, the Honorable C. Weston Houck, Chief, United States District Judge, presiding, and the issues having been duly tried and a decision having been rendered,

IT IS ORDERED that the defendant forthwith admit Shannon Richey Faulkner to the South Carolina Corps of Cadets under such terms and conditions as this court orders.

A hearing was held in this matter on August 1, 1994, for the purpose of considering the means by which The Citadel proposes to implement the Court's order that the plaintiff Shannon Richey Faulkner be admitted to the Corps of Cadets. The agreements reached by the parties on that issue are accepted by the Court. The disagreements the parties have are,

for the reasons stated at the August 1, 1994, hearing, disposed of as follows:

1. The motion of the plaintiffs that a special sexual harassment committee be appointed is, at this time, denied.

2. The motion of the plaintiff to have a lock placed on the plaintiff Faulkner's bedroom door is neither granted nor denied. Instead, the defendants are required to provide to Faulkner in her living quarters at least the same level of security a single male cadet has in the barracks at night.

3. The plaintiff Faulkner's request for a special escort on campus at night is denied.

4. The plaintiff Faulkner's motion to prohibit The Citadel from giving her the same type haircut it gives male Fourth Class members of the Corps of Cadets is denied. The Citadel is free to determine what type haircut, if any, to give the plaintiff Faulkner upon her entry into the Corps.

Dated at Charleston, South Carolina, this 5th day of August, 1994.

LARRY W. PROPES, CLERK

Lisa H. Walpole

Deputy

APPROVED:

C. Weston Houck

C. WESTON HOUCK
CHIEF, UNITED STATES DISTRICT JUDGE

APPENDIX D

Minute Order of the
United States District Court
District of South Carolina

Shannon Richey FAULKNER, Individually
and on behalf of all others similarly situated, Plaintiff,
and
the United States of America, Plaintiff-Intervenor,
v.
James E. JONES, Jr., Chairman, Board of Visitors of
The Citadel, et al., Defendants,

Civ. A. No. 2:93-488-2.

United States District Court,
D. South Carolina

August 17, 1993

MINUTE ORDER

For the reasons stated at the hearing held on August 12, 1993, plaintiff's motion for preliminary injunction is granted.

Dated this 17th day of August, 1993, in Charleston, South Carolina.

ANN A. BIRCH, CLERK

Judith M. McDowell
Deputy

APPENDIX E

Opinion of the
United States Court of Appeals
for the Fourth Circuit

10 F.3d 226

Shannon Richey FAULKNER, Individually
and on behalf of all others similarly situated;
United States of America, Plaintiffs-Appellees,
v.
James E. JONES, Jr., Chairman, Board of Visitors of
The Citadel, et al.,Defendants-Appellants.

No. 93-2030.

United States Court of Appeals,
Fourth Circuit.

Nov. 17, 1993.

Before HALL, NIEMEYER, and HAMILTON, Circuit Judges.

OPINION

NIEMEYER, Circuit Judge:

Shannon R. Faulkner was conditionally admitted to The Citadel, a South Carolina state military college, to begin classes in the fall of 1993. When her female gender was discovered, however, The Citadel withdrew its acceptance in accordance with its 150-year-old policy of admitting only males. Faulkner then filed this suit to compel her admission, contending that the college's policy of excluding females violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

The district court issued a preliminary injunction ordering that Faulkner be admitted to day classes at The Citadel,

but not, consistent with her request, to its Corps of Cadets. Pending briefing and argument on appeal, we stayed the order, concluding that "public interest demands that resolution of an issue of such extraordinary complexity not be compressed into a proceeding solely to determine whether a stay is granted." Balancing the relative harms of the parties on a scale adjusted by the plaintiff's likelihood of success on the merits, we now conclude that the district court did not abuse its discretion in issuing the preliminary injunction and affirm.

I

The Citadel, established in 1842, is a state-supported four-year military college, located in Charleston, South Carolina. Although it provides undergraduate, evening and graduate courses to a total student population of almost 3,800, The Citadel's unique undergraduate education incorporating a rigorous military training is made available only to its Corps of Cadets, consisting of approximately 2,000 students. By means of an adversative military methodology which the parties characterize as being similar to that employed by the Virginia Military Institute in Lexington, Virginia, described in *United States v. Commonwealth of Virginia*, 766 F.Supp. 1407 (W.D.Va.1991), The Citadel seeks, according to its mission statement, "to educate male undergraduate students as members of the South Carolina Corps of Cadets and to prepare them for postgraduate positions of leadership through academic programs of recognized excellence supported by the best features of a disciplined military environment and rigorous training." Throughout its 150-year history, The Citadel has maintained a policy of admitting only men to its Corps of Cadets. It has, however, admitted women to other educational programs.

Shannon R. Faulkner, as an honor student at Wren High School in Anderson County, South Carolina, applied for admission to The Citadel in January 1993. The Citadel was her first choice for college because she hoped "to attend a college in a military environment" and believed The Citadel's program to be "unique" in South Carolina and to offer "many

advantages which [she] could not receive at any other college in South Carolina." The Citadel, not realizing that Faulkner was female,[1] admitted her on a provisional basis, as it does for every student. When The Citadel discovered that Faulkner was female a short time thereafter, it promptly revoked her admission.

Alleging that the male-only admissions policy of The Citadel denied her equal protection of the laws, Faulkner filed suit in March 1993. Shortly thereafter, in May 1993, the South Carolina General Assembly passed a joint resolution which affirmed a state policy of favoring single-gender educational institutions. The resolution declares that:

> South Carolina has historically supported and continues to support single-gender educational institutions as a matter of public policy based on legitimate state interests where sufficient demand has existed for particular single-gender programs thereby justifying the expenditure of public funds to support such programs.

The General Assembly also formed a ten-member committee to examine the need for single-gender educational opportunities for women in South Carolina and to submit recommendations for the General Assembly to consider at the beginning of its 1994 session.

On July 8, 1993, Faulkner filed a motion in the pending litigation for a preliminary injunction mandating that she be permitted to attend day classes pending the outcome of the litigation. Her motion did not request that she be admitted to the Corps of Cadets. Faulkner argued that even The Citadel's expert testimony conceded that her attendance in the classroom only would not have harmful effects. On August 12, 1993, following a hearing, the district court granted Faulkner's motion for a preliminary injunction, concluding that the "irreparable harm that [Faulkner] will suffer if her constitutional

---

[1] Apparently, The Citadel's application form does not call for a statement of gender and Faulkner decided not to volunteer the information so that she could be "considered on the merits."

rights are continued to be denied her far outweighs any irreparable harm The Citadel will sustain if she is admitted to the Day Program." Indeed, the court concluded that it was "unable to perceive of any significant irreparable harm or harm that will be suffered by The Citadel if this plaintiff is admitted to the Day Program."

This appeal followed, and, to allow for full briefing and argument, we stayed the effect of the district court's preliminary injunction and ordered an expedited schedule for briefing and argument.

II

The Fourteenth Amendment, which was adopted after the Civil War to provide the newly-freed blacks with the same protection of the laws as that afforded to other persons, states in deceptively simple language, "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." Although the clause clearly provides that a law must apply with equal force to all persons within a class defined by the law, it does not require that a law, which is limited in its scope to a particular class, apply in the same way to persons outside of that class. While it may be popular to believe that the Equal Protection Clause prohibits distinctions even in classifications—for that conclusion is suggested by the overly generalized statement that "all men are created equal"[2]—the clause accommodates the opposite notion, that people are created differently. Fundamental injustice would undoubtedly result if the law were to treat different people as though they were the same. *See Jenness v. Fortson*, 403 U.S. 431, 442, 91 S.Ct. 1970, 1976, 29 L.Ed.2d 554 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."). Thus, different classes are routinely defined by legislation without

---

[2] See Lincoln's Gettysburg Address ("Four score and seven years ago, our fathers brought forth upon this continent a new nation, conceived in liberty and dedicated to the proposition that *all men are created equal*.") and the Declaration of Independence ("We hold these Truths to be self-evident, *that all Men are created equal*.").

objection. For example, statutes limit the licensing of drivers to a class of persons 16 and over, or drinking to a class of persons 18 and over. In addition, classifications by gender have been utilized to require men to register for the draft, but not women, *see Rostker v. Goldberg*, 453 U.S. 57, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981), and to qualify only men for employment in maximum security prisons, *see Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). In short, the Fourteenth Amendment "does not deny to States the power to treat different classes of persons in different ways." *Reed v. Reed*, 404 U.S. 71, 75, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). When a regulation undertakes to define a class, however, the criteria for defining the class must be related to the purpose of the regulation. *See Reed*, 404 U.S. at 76, 92 S.Ct. at 254 (holding that Idaho statute which gives preference to the appointment of men over women as estate administrators violates the Equal Protection Clause).

We may thus begin the analysis for determining whether the equal protection of the laws is denied with the inquiry of whether the classification made has an appropriate relation to the purpose of the regulation. A regulatory classification which is made for a purpose *unrelated* to the purpose of the regulation, or which is broader than that appropriate for the regulation, may reveal prejudice and define discrimination. *See e.g., Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967) (finding that a state's interest in regulating marriage is unrelated to race and therefore a statute prohibiting racially mixed marriages has "no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification").

Even when a classification is appropriately related to the regulation's purpose, we must weigh and evaluate the state's interest in accomplishing the regulation's purpose. Under the current equal protection jurisprudence, the adequacy of the state's purpose varies with the nature of the classification. Thus, a classification based on race or national origin or which affects fundamental rights secured by the Constitution is examined most closely because the classification is deemed inherently suspect. Only a compelling state interest, advanced

by the least restrictive means, will justify the classification on these bases. *See, e.g., Palamore v. Sidoti*, 466 U.S. 429, 432-33, 104 S.Ct. 1879, 1881-82, 80 L.Ed.2d 421 (1984) (holding that custody decision based on race is not justified). On the other hand, classifications based on economic factors need only be rationally related to a legitimate governmental interest. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-40, 105 S.Ct. 3249, 3253-54, 87 L.Ed.2d 313 (1985) (applying rational basis test to economic and social legislation). A regulation that classifies by gender, such as that at issue in this case, is not subject to the same strict scrutiny as is one that classifies on the basis of race or national origin, due to the acknowledged differences between males and females, but it nevertheless demands more scrutiny than do economic regulations. *See United States v. Commonwealth of Va.* ("VMI"), 976 F.2d 890, 895-98 (4th Cir.1992), *cert. denied sub nom., Virginia Military Institute v. United States*, — U.S. ——, 113 S.Ct. 2431, 124 L.Ed.2d 651 (1993). The scrutiny to be given regulations classifying by gender has been characterized as intermediate. "To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *See Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 1914, 100 L.Ed.2d 465 (1988); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982). Legislative distinctions based on gender may thus be justified by an important governmental interest in recognizing demonstrated differences between males and females. But intermediate scrutiny will reject regulations based on stereotypical and generalized conceptions about the differences between males and females. *See Hogan*, 458 U.S. at 724-25, 102 S.Ct. at 3336-37; *Frontiero v. Richardson*, 411 U.S. 677, 684-85, 93 S.Ct. 1764, 1769-70, 36 L.Ed.2d 583 (1973).

These principles were applied to circumstances strikingly similar to those before us in the *VMI* case. In *VMI*, we accepted the district court's factual findings which recognized physical and psychological differences between men and women. The heart of VMI's military training program, aimed at producing citizen soldiers, depended on a methodology that

reduced the cadets in training to an as-equal-as-possible status by physical and mental adversity, stress, deprivation of privacy, and minute regulation of behavior, and at the same time, relied on instilling values based on a strict code of conduct. While the evidence demonstrated that the adversative relationship of male against male tended to produce a desired result, an adversative relationship of male against female was believed to lead to different consequences. *See VMI*, 976 F.2d at 896. We also accepted the finding by the district court that if women were admitted to VMI, differences in physical ability between men and women, as well as concerns for privacy, would require VMI to adopt a "dual-tracking" program for training men and women in order to achieve equality in effect. This conclusion was based on the evidence that the military service academies, which are coeducational, found it necessary in every case to adopt dual-track programs for men and women. *Id.* We recognized, however, that dual-tracking would yield effects that might be unequal between the sexes, leading to jealousy and resentment. *Id.*

In light of the district court's findings, we concluded in *VMI* that coeducation would so fundamentally change VMI's military program that neither males nor females would receive the training which VMI offered through its single-gender program. "It is not the maleness, as distinguished from femaleness, that provides justification for the program. It is the homogeneity of gender in the process, regardless of which sex is considered, that has been shown to be related to the essence of the education and training at VMI." *VMI*, 976 F.2d at 897. With respect to the educational program, we observed that scientific studies offered into evidence supported the conclusion that single-sex education is pedagogically justifiable both for males and females. *Id.* Thus, with respect to both VMI's military and educational aspects, we held that a single-gender policy was justified by an important state purpose and that the state could appropriately offer a single-gender military education.

While providing a single-gender military education was held to constitute an appropriately important state purpose,

we could find no state policy justifying Virginia's decision to offer this unique type of education only to men. *VMI*, 976 F.2d at 899. No evidence was presented that women might not also benefit from a program of military training designed to produce women citizen soldiers. The state offered only diversity as an announced justification. We concluded, however, that a policy of diversity is not advanced by the establishment of an institution for only one gender. *Id.* We remanded the case to the district court with instructions to elicit a plan from the state complying with the Fourteenth Amendment. We allowed for the possibility that a plan could still permit VMI to remain a state-supported single-gender institution, if that were the will of Virginia, so long as women were offered a parallel program. *Id.* at 900. The order in *VMI* did not, however, direct that any parallel program which the state might choose to provide be identical for both men and women.

In a circumstance where a gender classification is *not* justified by an acknowledged difference between men and women, the equality of treatment demanded cannot be satisfied by "separate but equal" facilities. *See VMI*, 976 at 898 n. 7. "Separate but equal" does not amount to equal. Thus, in the context of a racial classification which was *not justified* by the regulation's purpose, the requirement of equal treatment could not be satisfied by "separate but equal" treatment. *See Brown v. Board of Education*, 347 U.S. 483, 495, 74 S.Ct. 686, 692, 98 L.Ed. 873 (1954). When, however, a gender classification *is justified* by acknowledged differences, identical facilities are not necessarily mandated. Rather, the nature of the difference dictates the type of facility permissible for each gender.

The point is illustrated by society's undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different. Therefore, any analysis of the nature of a separate facility provided in response to a justified purpose, must take into account the nature of the differ-

ence on which the separation is based, the relevant benefits to and the needs of each gender, the demand (both in terms of quality and quantity), and any other relevant factor. In the end, distinctions in any separate facilities provided for males and females may be based on real differences between the sexes, both in quality and quantity, so long as the distinctions are not based on stereotyped or generalized perceptions of differences.

That said about our decision in *VMI*, we come to the problem before us, whether the district court abused its discretion in entering a preliminary injunction, based on *VMI*, ordering that The Citadel admit Shannon Faulkner to day classes pending the outcome of the litigation on the merits.

III

On the state of the record as it now exists, we can perceive no reason why our holding in *VMI* would not apply in this case. The Citadel is a state-supported military college not unlike the Virginia Military Institute, which was the subject of our holding in *VMI*.

South Carolina has demonstrated that, in contrast to Virginia's unwillingness to take a position in *VMI*, *see VMI*, 976 F.2d at 894, South Carolina has adopted a policy supporting The Citadel. A resolution adopted in May 1993 by both houses of the legislature embraced all the positive contributions of The Citadel and reaffirmed a policy of providing its benefits only to males.

While the announced South Carolina policy reaffirms The Citadel's positive contributions, it does not connect these values to a male-only characteristic. Rather, the values stated in the resolution would appear to relate to a single-gender policy for institutions. The resolution also offers no explanation for the failure to offer women the same opportunity to participate in a single-gender institution and achieve similar goals as that afforded to men at The Citadel. Although South Carolina has appointed a committee to review the absence of

opportunity for women, the committee will not report to the legislature until January 1994.

Notwithstanding this difference, South Carolina has not hesitated to argue its case in reliance on *VMI*, contending that The Citadel should not be required to admit Faulkner and thereby impose coeducation, when this court was not prepared to impose coeducation in *VMI*. The argument is valid and, were it not for other circumstances present here, it might be determinative. In *VMI*, however, no preliminary injunction was sought. In this case, a preliminary injunction was sought and, in the judgment and discretion of the district court, was entered. The order imposed does not require structural changes to The Citadel's program. While the presence of a female in the day classes may be disruptive in the first days, an order permitting Faulkner's attendance is not tantamount at this time to integrating or altering the military program at The Citadel. The district court found in these circumstances that the irreparable injury to Faulkner, if the motion were to be denied, was "crystal clear," yet found that any injury to The Citadel was "minimal at best." Indeed, the court stated, "I am unable to perceive of any significant irreparable harm or harm that will be suffered by The Citadel if [Faulkner] is admitted to the Day Program." The evidence tends to support the finding. Dr. Richard Richardson, an expert in higher education and a consultant to the South Carolina Commission on Higher Education, stated that The Citadel could still maintain its primary mission, even if women were added to the classroom. Claudius E. Watts, III, the President of The Citadel, also testified that the academic offering and performance of men at The Citadel would not be affected by the admission of women. Similarly, Dr. Thomas W. Mahan, who has taught education and psychology at The Citadel for nearly twenty years, testified that there was no evidence to assume that admission of women would lower the performance of men academically. While such evidence does not address all the gains and losses that distinguish single-gender education from coeducation, we cannot say that the district court's factual

findings are clearly erroneous. That nevertheless does not end our review.

In determining whether the district court abused its discretion in entering the preliminary injunction, we must still review the district court's evaluation of the continuing status of the parties pending the outcome of the litigation, focusing on the relative hardships that would result if the relief were to be granted. *See Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802 (4th Cir.1991); *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir.1977). When weighing the potential harms, moreover, a court is required to keep sight of the relevant strengths of the parties' positions on the merits. Thus, while a substantial discrepancy in the potential harms would have to be found to favor a party whose potential for success on the merits was no better than even, less discrepancy in relative harms may suffice when that party's chances for success on the merits are probable.

In this case, ordering Faulkner to day classes will probably shake The Citadel's stability temporarily. However, the preliminary injunction will not change or destroy any material aspect of The Citadel's program. Moreover, no temporary adverse impact would be irreversible for The Citadel. Denying Faulkner's access, on the other hand, might likely become permanent for her, due to the extended time necessary to complete the litigation. The most telling aspect of this case, and that which distinguishes this case from *VMI*, is the presence of this time pressure, combined with an absence of present opportunity for Faulkner.

South Carolina is not prepared to provide an alternative remedy to Faulkner at this time, and it has not suggested one. Any alternative would have to await the results of the state committee's study, a court review of the committee's report, and implementation. In the meantime, current state policy denies Faulkner any relief to which she probably would be entitled in the long run, whether by attendance at The Citadel or at some other institution. Under these circumstances, we conclude that the district court did not abuse its discretion in

entering the preliminary injunction for the limited, but temporary relief.

We are quick to note that the status imposed by the preliminary injunction is not permanent and does not determine the outcome on the merits. Those issues must await trial and findings by the district court. We trust that the court will proceed to hear the merits without undue delay, recognizing the importance of the interests of all parties which remain at stake.

AFFIRMED.

K.K. HALL, Circuit Judge, concurring:

Notwithstanding this court's holding in *VMI*, I question whether, under the Equal Protection Clause, a state can ever have a sufficiently important interest to justify expending public funds to maintain an institution that not only practices inequality, but celebrates it.

Nevertheless, being bound by *VMI*, I concur in the opinion. I heartily concur in the result.

HAMILTON, Circuit Judge, dissenting:

Without pause or demonstrated concern for the devastating consequences of its actions, the majority emasculates a venerable institution by jettisoning 150 years of impeccable tradition and distinguished service. Because the mandatory preliminary remedy imposed by the majority of this court is devoid of any showing of irreparable harm to Faulkner or a strong likelihood that Faulkner will succeed on the merits, decimates the *status quo* without first affording The Citadel an opportunity to justify its all-male admissions policy in a trial on the merits, frustrates the State of South Carolina's sovereign power by stripping its right to select and implement its own remedy upon the establishment of a constitutional violation, and conflicts with admonitions of the Supreme Court and this Circuit, I am constrained to dissent.

I

To place this case in proper perspective, it is helpful to start with a discussion of the district court's findings resulting in its decision to issue the mandatory preliminary injunction. The district court began its analysis by finding that a denial of Faulkner's request for preliminary relief would irreparably harm her. In reaching this conclusion, the district court opined:

> I think it's unfair to the plaintiff and an improper solution to the irreparable harm issue to consider only the extent to which her admission to the day program will diminish the harm suffered by her as a result of the denial of her constitutional right. I believe that she has been denied that constitutional right by not being admitted to The Citadel.

(J.A. 85). Thus, although the district court considered the preliminary relief "meager and ... inadequate," and recognized that the relief requested would not remedy the alleged equal protection violation, the district court nevertheless found that Faulkner would be irreparably harmed by the continued violation of her constitutional rights unless some form of preliminary relief was imposed. (J.A. 85, 87).

The district court then concluded, without providing any findings, that the mandatory preliminary injunction would not harm The Citadel. (J.A. 87). The district court next addressed Faulkner's likelihood of success on the merits. Remarkably, without regard to any proof proffered by The Citadel or the recognized pedagogical benefits of single-gender education, the district court found that our decision in *United States v. Commonwealth of Virginia*, 976 F.2d 890 (4th Cir.1992) (*VMI*) compelled a conclusion that The Citadel's all-male admissions policy *ipso facto* violated Faulkner's equal protection rights. Believing the balance of harms weighed in Faulkner's favor and that she had a strong probability of establishing an equal protection violation, the district court concluded that Faulkner

was entitled to a mandatory preliminary injunction requiring her admittance to day classes at The Citadel. The district court reasoned "[c]learly her irreparable harm caused by the denial of her constitutional rights will be diminished by the granting of that motion." (J.A. 87).

II

Any analysis of the appropriateness for a preliminary injunction must begin with the admonition that "the grant of interim relief [is] an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it." *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 811 (4th Cir.1991) (quotation omitted). In *Blackwelder Furn. Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 194-97 (4th Cir.1977) and *Direx Israel*, 952 F.2d at 812, we outlined the precise analytical framework which courts must employ in determining whether to grant preliminary relief. First, the party requesting preliminary relief must make a "clear showing" that she will suffer *irreparable* harm if the court denies her request. *Direx Israel*, 952 F.2d at 812-13. A failure to establish irreparable harm "is by itself a sufficient ground upon which to deny a preliminary injunction." *Gelco Corp. v. Conniston Partners*, 811 F.2d 414, 418 (8th Cir.1987). Second, if that party establishes irreparable harm, "the *next* step then for the court to take is to balance the likelihood of irreparable harm to the plaintiff [from the failure to grant interim relief] against the likelihood of harm to the defendant [from the grant of such relief]." *Direx Israel*, 952 F.2d at 812 (inner quotations omitted).

Third, if the balance tips decidedly in favor of the party requesting preliminary relief, "a preliminary injunction will be granted if the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus more deliberate investigation." *Id.* at 813. However, "[i]f the balance does not tip decidedly, there must be 'a strong probability of suc-

cess on the merits.'" *Id.* (*quoting Frisch's Restaurant, Inc. v. Shoney's, Inc.*, 759 F.2d 1261, 1270 (6th Cir.1985)). Fourth, the court must evaluate whether the public interest favors granting preliminary relief.

On appeal, we review the lower court's decision to grant or deny preliminary relief under the abuse of discretion standard. In undertaking this review, however, Congress did not intend "appellate courts to be mere rubber-stamps save for the rare cases when a district judge has misunderstood the law or transcended the bounds of reason." *Roland Machinery Co. v. Dresser Indus.*, 749 F.2d 380, 389 (7th Cir.1984). Thus, we have held:

> Particularly where the appeal is from a grant of preliminary injunction, which represents the exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it, the standard of appellate review must not be reduced to the largely meaningless ritual of the typical abuse of discretion standard.

Direx Israel, 952 F.2d at 814 (inner quotations omitted).

Accordingly, the abuse of discretion standard in the present case "is not a rule of perfunctory appellate review[,] but one of careful scrutiny." *Id.* at 815. Applying our four-part analysis and the requisite careful scrutiny, it is pellucidly clear that the district court abused its discretion in granting the preliminary injunction.

III

A

Irreparable Harm

In analyzing the irreparable harm to Faulkner resulting from the denial of preliminary relief, the district court determined that it would be "an improper solution ... to consider only the extent to which her admission to the day program will diminish the harm suffered by her as a result of the de-

nial of her constitutional right." (J.A. 85). In other words, the district court found it improper to begin its analysis by considering *only* the degree to which the preliminary relief would alleviate the alleged harms in determining whether the denial of that injunction would irreparably harm Faulkner. Logic demands otherwise.

Our jurisprudence requires a party requesting interim relief to establish that she will be irreparably harmed if the court denies the relief. *Direx Israel*, 952 F.2d at 812-13. It strains the bounds of reason to conclude that the refusal to impose interim relief, which admittedly fails to remedy a perceived constitutional violation and is considered "meager and ... inadequate," will inflict irreparable harm. (J.A. 85, 87). Instead, any inquiry into the irreparable harm resulting from the denial of interim relief *must* necessarily *begin* with an analysis of the degree to which that particular relief remedies the alleged injuries. If the relief requested does little, if anything, to alleviate the alleged injuries, it is difficult to comprehend how the refusal to grant that relief could cause irreparable harm.[1] Following the mistaken reasoning of the district court and the majority, if a party seeking to compel a state to provide her medication for cancer requested interim relief requiring the state to provide her with band-aids during

---

[1] The majority applies the clearly erroneous standard to affirm the district court's finding that Faulkner would be irreparably harmed if the preliminary relief were denied. Op. at 233. However, because the district court's findings stemmed from an erroneous legal conclusion that it should not *begin* by considering the degree to which the preliminary relief ameliorates the alleged injuries, the *de novo*, rather than the clearly erroneous, standard of review should apply. *See, e.g., Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 358 (4th Cir.1991) ("[A]n appellate court will overturn a district court's decision if made under an improper legal standard."). *See also, Romberg v. Nichols*, 953 F.2d 1152, 1156 (9th Cir.1992) ("We must reverse if the district court applied the wrong legal standard to reach [the factual findings]."); *United States v. Rodriguez-Morales*, 929 F.2d 780, 783 (1st Cir.1991) ("[T]he court of appeals reviews the district court's findings of fact ... under the clearly erroneous standard. Of course if the lower court applies the wrong legal standard, no deference attaches.").

the pendency of the litigation, the denial of that preliminary relief would ostensibly cause irreparable harm.

In the proceedings below and before this court, Faulkner asserted that, without the preliminary injunction requiring The Citadel to admit her to day classes, she would be irreparably harmed. Faulkner identified three primary sources of irreparable harm: (1) the denial of her constitutional rights; (2) the inability to begin the "bonding" process with her potential fellow cadets and professors; and (3) the denial of access to the network of Citadel alumni. As discussed in Part C, *infra*, Faulkner has failed, at this preliminary point in the proceedings, to establish any deprivation of her constitutional rights. Consequently, because the preliminary relief imposed by the majority fails to alleviate the second and third alleged injuries, Faulkner falls woefully short in her efforts to demonstrate irreparable harm.

Our decision in *VMI* compels the conclusion that the mandatory preliminary relief in the present case does nothing to alleviate the second and third injuries alleged by Faulkner. In *VMI*, a case strikingly similar to the instant matter, we expressly "accepted the district court's factual finding [ ]" that:

> [T]he academic program at VMI is not unique.... [T]he most important aspect of the VMI experience occurs in the barracks ... [which] are designed to reduce all cadets to the lowest common denominator, from which the new cadet training system, class system, honor code, military system and academic system year-by-year builds the values, attitudes and behaviors expected from VMI graduates.... Producing a VMI graduate without the barracks experience would be equivalent to dressing someone up in a uniform of a Marine without first sending them to boot camp.

VMI, 976 F.2d at 892 (*incorporating United States v. Commonwealth of Virginia*, 766 F.Supp. 1407, 1423, 1424 (W.D.Va.1991)).

The Citadel provides a remarkably similar, if not identical, program. Thus, even though its classroom education provides an important part of The Citadel experience, by itself, it contributes little to the overall objectives of The Citadel program. Instead, The Citadel accomplishes its holistic and egalitarian goals primarily through other aspects of its program, such as the barracks life and the rigorous physical training. Because the preliminary remedy in the present case fails to provide these quintessentials—the meat and potatoes of The Citadel's program—to Faulkner, I believe her attendance at The Citadel's day classes will neither further Faulkner's ultimate desire to receive the full Citadel experience, nor afford her a substantial opportunity to "bond" with other cadets. Faulkner does not seek to "bond" with other cadets as a day student, but rather as a full-fledged *member* of the Corps of Cadets. The preliminary relief mandated by the majority does nothing to further this goal.[2] Moreover, graduating from The Citadel after merely attending day classes will, undoubtedly, separate Faulkner from other Citadel alumni who endured the other rigorous aspects of that institution's holistic and egali-

---

[2] Ironically, a majority of this panel reached the same conclusion when we granted The Citadel's motion for stay of the preliminary injunction pending appeal. Specifically, in that order we convincingly observed:

> *[T]hat Faulkner's desire to become a member of the corps of cadets at The Citadel and obtain military education and training is not fulfilled by the preliminary injunction entered in this case, mandating that she be admitted to day classes only.* To require South Carolina and The Citadel to admit her only to classes and thereby make only the classroom experience co-educational may not be materially different from requiring South Carolina to admit her to the University of South Carolina, also a state funded co-educational school of presumably comparable quality.... *If ... a military education and training of the kind offered at The Citadel is the object, the preliminary injunction does not meet it.*

Faulkner v. Jones, No. 93-2030 Order at 3-4 (4th Cir. filed Aug. 24, 1993) (emphasis added).

tarian program. Because the preliminary injunction does little, if anything, to ameliorate the injuries which would allegedly result from Faulkner's exclusion from The Citadel's day classes, missing the classroom experience pending the outcome of this litigation certainly imposes no irreparable harm on Faulkner.

B

Harm to The Citadel

Faulkner's inability to establish irreparable harm "is by itself a sufficient ground upon which to deny a preliminary injunction," *Gelco Corp.*, 811 F.2d at 418. Nevertheless, an analysis of the harm to The Citadel resulting from the mandatory preliminary injunction provides an alternative basis for denying the interim relief sought. Specifically, because the relative harms to each party do *not* weigh decidedly in Faulkner's favor, Faulkner bears the heavy burden of demonstrating "a strong probability of success on the merits." *Frisch's Restaurant, Inc.*, 759 F.2d at 1270. As discussed in Part C, *infra*, Faulkner failed to make such a showing at this preliminary stage.

The majority believes that an order allowing Faulkner to attend day classes imposes little if any harm on The Citadel. The majority reasons: "While the presence of a female in the day classes may be disruptive in the first days, an order permitting Faulkner's attendance is not tantamount at this time to integrating or altering the military program at The Citadel." Op. at 233. The contrary is true.

Faulkner's motion for class certification currently looms before the district court. The putative class, as currently defined, includes "all people who have been denied admission to The Citadel because they're female." (J.A. 68). The district court already announced an inclination to grant certification. (J.A. 64). If the district court grants certification, then all putative class members will be entitled to the same relief afforded the class representative. Requiring The Cita-

del to admit a large number of females to its day classes will undeniably disrupt The Citadel's program.

Moreover, I believe the mandatory preliminary injunction inflicts a more subtle, but no less substantial, injury on The Citadel. Specifically, the preliminary injunction harms The Citadel because it disrupts—in fact destroys—the *status quo* without first affording that institution an opportunity to defend on the merits. 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2948 (1973) ("Arguably, the fact that [the] defendant would be ordered to act in a particular way, rather than be enjoined from engaging in certain action may make a mandatory injunction more burdensome in some cases.").

Courts routinely recognize that "the basic function of a preliminary injunction is to preserve the *status quo* pending a determination of the action on the merits." *Chalk v. U.S. Dist. Court Cent. Dist. of Calif.*, 840 F.2d 701, 704 (9th Cir.1988). *See also, Cordis Corp. v. Medtronic, Inc.*, 835 F.2d 859, 863 (Fed.Cir.1987); *Blackwelder Furn. Co.*, 550 F.2d at 195. The "*status quo*" does not "consist of a photographic replication of the circumstances existing at the moment suit was filed," but rather "the last peaceable uncontested status that existed before the dispute arose." *Massachusetts Mut. v. Associated Dry Goods*, 786 F.Supp. 1403, 1427 (N.D.Ind.1992) (*citing Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472, 476 (9th Cir.1969); *Rees v. Panhandle Eastern Pipeline Co.*, 377 N.E.2d 640, 646 (Ind.App.1978); *Mounce v. Bostic*, 531 S.W.2d 887 (Tex.Civ.App.1976)). Thus, "[m]andatory preliminary relief, which goes well beyond simply maintaining the *status quo pendente lite*, is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party." *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir.1979) (*quoting Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir.1976)). *See also, Martin v. Int'l. Olympic Committee*, 740 F.2d 670, 675 (9th Cir.1984); *Dillard v. Crenshaw County*, 640 F.Supp. 1347, 1362 (M.D.Ala.1986).

Remarkably, the majority wholly ignores these concepts, inflicting a remedy which decimates a *status quo* that has per-

severed with notable distinction and honor for 150 years. The majority does so at this preliminary stage of the litigation without first affording The Citadel an opportunity to defend its all-male admissions policy on the merits.[3] As Justice Scalia admonished:

> Whether it is constitutional for a State to have a men-only military school is an issue that should receive the attention of this Court *before*, rather than after, a national institution as venerable as the Virginia Military Institute is compelled to transform itself.

Virginia Military Institute v. United States, — U.S. ——, 113 S.Ct. 2431, 124 L.Ed.2d 651 (1993) (Scalia, J., dissenting) (emphasis added). Is The Citadel entitled to the same consideration as VMI? Obviously, The Citadel *must* be afforded this *same* opportunity to defend its all-male admissions policy on the merits *before* this court ravages such a long-standing tradition. The failure to provide this opportunity undeniably wreaks incalculable harm on The Citadel.[4]

---

[3] Nowhere in its opinion does the majority suggest that "the facts and law *clearly* favor Faulkner." *Anderson*, 612 F.2d at 1114. Instead, the majority states only that "current state policy denies Faulkner any relief to which she *probably* would be entitled in the long run." Op. at 233. Our precedent clearly demands a stronger showing. *Direx Israel*, 952 F.2d at 808.

[4] As a final point, it has been suggested that Faulkner's tactics in gaining admission to The Citadel, *i.e.*, surreptitiously eliminating any reference to her gender on document(s) accompanying her application, violated The Citadel's strict code of honor. The preliminary injunction, requiring The Citadel to admit Faulkner to its day classes, therefore inflicts an additional harm on The Citadel in that it deprives that institution of its right to treat Faulkner as it would any other student, *e.g.*, to determine whether Faulkner violated the code of honor by misrepresenting her status on the document(s) accompanying her application and, if so, to administer the appropriate discipline: expulsion.

C

Probability of Success on the Merits

At best then, the balance of harms does not "tip decidedly" in Faulkner's favor. Consequently, to obtain the preliminary relief sought, Faulkner must establish "a strong probability of success on the merits." *Frisch's Restaurant, Inc.*, 759 F.2d at 1270. At this point in the proceedings, I believe Faulkner failed to make such a showing. However, even assuming *arguendo* that Faulkner established a strong probability of success, I think our jurisprudence, as well as compelling concerns of comity and federalism, nonetheless prohibits this court from imposing the preliminary relief ordered by the majority.

1

Under the Equal Protection Clause of the Fourteenth Amendment, classifications based on gender may survive judicial scrutiny if they serve "important governmental objectives" and "the discriminatory means employed [are] substantially related to the achievement of those objectives." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982) (*quoting Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150, 100 S.Ct. 1540, 1545, 64 L.Ed.2d 107 (1980)). Even the majority in this case recognizes that "[T]he Fourteenth Amendment 'does not deny to States the power to treat different classes of persons in different ways.' " Op. at 230-31 (*quoting Reed v. Reed*, 404 U.S. 71, 75, 92 S.Ct. 251, 253-54, 30 L.Ed.2d 225 (1971)). However, the governmental objective may, under no circumstances, reflect "archaic and stereotypic notions" of men and women. *Id.*

In *Hogan*, 458 U.S. at 718, 102 S.Ct. at 3331, the Supreme Court applied these principles to a case similar to the one before us. There, the Supreme Court addressed a challenge to Mississippi's Nursing School admissions policy which excluded men. In evaluating a male applicant's equal protec-

tion challenge to this admission policy, the majority of the Court specifically rejected Justice Powell's dissenting view, which suggested that a policy favoring diversity of educational opportunities allows a state to provide single-sex education to only one gender. The majority reasoned:

> The issue is not whether the benefitted class profits from the classification, but whether the state's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.

Id. at 731 n. 17, 102 S.Ct. at 3340 n. 17. However, the Court did not specifically find that providing single-gender education created a *per se* violation of the Equal Protection Clause of the Fourteenth Amendment. Instead, because "the record [was] flatly inconsistent with the claim that excluding men from the School of Nursing [was] necessary to reach any of MUW's educational goals," the Court found that MUW could not justify its single-gender admissions policy. *Id.* at 731, 102 S.Ct. at 3339-40.

In *VMI*, we also applied an equal protection analysis to facts resembling those in the present case. There, we found that the exclusion of women did not stem from archaic or stereotypical perceptions, but rather was *necessary* to accomplish VMI's educational goals. Specifically, we stated:

> It is not the maleness, as distinguished from femaleness, that provides justification for the program. It is the homogeneity of gender in the process, regardless of which sex is considered, that has been shown to be related to the essence of the education and training at VMI.

VMI, 976 F.2d at 897. In other words, VMI's educational experience required equal treatment for all cadets in all aspects, as well as complete deprivation of privacy. Because of the

physiological differences between men and women, VMI's program necessarily could, therefore, only admit one gender.

Nevertheless, we found VMI's all-male admissions policy violated the Equal Protection Clause. Although Virginia offered diversity in educational opportunities as a justification for VMI's all-male admissions policy, we held that diversity *alone* does not justify a state's decision to provide particular opportunities to only one gender. *VMI*, 976 F.2d at 899. Instead, a state must also reasonably explain its failure to provide opportunities to both genders. Because "the Commonwealth of Virginia [did] not reveal[ ] a policy that explains why it offers the unique benefit of VMI's type of education and training to men and not to women," we held that Virginia's policy favoring diversity did not justify that state's failure to provide a VMI-type education to women. *Id.* at 898.

Under this precedent, it is far from certain that The Citadel's all-male admissions policy violates the Equal Protection Clause. As in *VMI*, the record in this case unequivocally demonstrates that the exclusion of women is "necessary to reach [The Citadel's] educational goals." *Hogan*, 458 U.S. at 731, 102 S.Ct. at 3340. Specifically, the egalitarian, holistic environment at The Citadel requires that institution to remain single-gender.

Moreover, under our holding in VMI, a state policy favoring diversity in educational opportunities may justify single-sex, state-funded institutions; however *if* the opportunity is not provided to both sexes, the state must reasonably explain the discriminatory treatment.[5] In the present case, South Carolina proffered just such an explanation. Specifically, South Carolina announced a policy to promote diversity in educational opportunities by providing single-sex, state-funded institutions *where* there is sufficient demand. Pursuant to this policy, South Carolina claims its failure to

---

[5] The concurring opinion apparently would prefer that we reject outright our own precedent and hold that a state could *never* justify state-funded, single-gender education. Clearly, neither the Supreme Court nor this court has exhibited any proclivity towards adopting such an absolutist approach.

provide an all-female, Citadel-type education stems from an inadequate demand for such an institution.

In furtherance of this policy, South Carolina's General Assembly formed a ten-member committee to examine the need (and presumably the demand) for single-gender educational opportunities for women in the State. The committee's report, due in January 1994, will contain recommendations for consideration by the General Assembly. This study and report, like any other discovery, may well affect a finding on the merits which is necessary to Faulkner's success or lack of success. Specifically, the study might "offer [an] explanation for [South Carolina's] failure to offer women the same opportunity to participate in a single-gender institution and achieve similar goals as that afforded men at The Citadel" by revealing a lack of sufficient interest by women for such an institution. Op. at 233.[6]

In light of these facts, the record, in its infant state, does not clearly establish a constitutional violation. Because Faulkner's probability of success on the merits is uncertain and the balance of harms does not tip decidedly in her favor, our precedent requires us to deny Faulkner's request for preliminary relief.

2

My most pronounced disagreement with the majority stems from its decision blatantly to ignore concerns of comity and federalism and desecrate the State of South Carolina's right to select and implement its own remedy. For this reason, even if Faulkner had established a strong likelihood of success on the merits, the mandatory preliminary relief ordered by the majority would still be inappropriate.

---

[6] The district court, in determining that Faulkner established a strong likelihood of success on the merits, failed to address these distinctions between the present case and *VMI*. Instead, the district court summarily concluded "[Faulkner's] likelihood of success in her case of obtaining equal protection of the law as defined in the *VMI* case is great." (J.A. 86).

Federal jurisprudence not only dictates, but demands that, upon finding a constitutional violation, federal courts must first afford the responsible state authorities an opportunity to devise and implement their own corrective action before imposing a judicially-created remedy. Only when the violation can be remedied through one particular method may a federal court, at the inception of the litigation, require the state to implement such corrective action. Concerns of comity and federalism require nothing less.

For example, in *Brown v. Board of Education* (*Brown I*), 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Supreme Court ruled that segregation of students in public schools violated the Equal Protection Clause of the Fourteenth Amendment. However, in determining how to remedy this violation, the Court opined:

> School authorities have the primary responsibility for elucidating, assessing and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.

Brown v. Board of Education (*Brown II*), 349 U.S. 294, 299, 75 S.Ct. 753, 755-56, 99 L.Ed. 1083 (1955). Thus, the Court refused to impose its own remedy for the equal protection violation, instead mandating that the lower courts "require ... the defendants [to] make a prompt and reasonable start toward full compliance ...," and ensure that the school officials proceed with "all deliberate speed" in devising a plan to admit those who had been discriminatorily denied entrance into the public schools. *Id.* at 300, 301, 75 S.Ct. at 756-57.

The Court further defined the role of federal courts in remedying constitutional violations in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). There, the Court opined:

> Remedial judicial authority does not put judges *automatically* in the shoes of school authori-

> ties whose powers are plenary. Judicial authority enters *only* when local authority defaults.

Id. at 16, 91 S.Ct. at 1276 (emphasis added). Thus, under *Brown II* and *Swann*, once a constitutional violation is established, courts must first afford the responsible state authorities an opportunity to devise and implement an appropriate remedy. Federal courts may impose their own remedy *only* if the responsible state authorities fail to take corrective action within a reasonable time.

Several lower courts have applied these principles in the context of preliminary injunctions. For example, in *Chisom v. Roemer*, 853 F.2d 1186 (5th Cir.1988), the Fifth Circuit denied black voters' request to preliminarily enjoin Louisiana's election scheme for its supreme court justices even though the court assumed the blacks would establish a *prima facie* claim for vote dilution. Specifically, the Fifth Circuit held "this case must run its full course, and, thereafter, assuming violations are found, the Louisiana Legislature must be afforded an opportunity to repair the defects the court discloses." *Id.* at 1192.

In reaching this conclusion, the *Chisom* court began with the "staunch admonition that a federal court should jealously guard and sparingly use its awesome powers to ignore or brush aside long-standing state ... practices." *Id.* at 1189. The court added:

> It is now established beyond challenge that upon finding a particular standard, practice, or procedure to be contrary to ... a federal ... constitutional requirement, the federal court *must* grant the appropriate state ... authorities an opportunity to correct the deficiencies.

Id. at 1192 (emphasis added). Because a preliminary injunction would have deprived Louisiana of its right to devise and implement its own remedy, the *Chisom* court denied the black voters' request for such relief.

In *VMI*, we also recognized these principles, allowing Virginia, *after the establishment* of an equal protection violation, the opportunity to devise and implement its own remedy. Specifically, we stated "we do not mean to suggest the specific remedial course that the Commonwealth should or must follow hereafter ...," and outlined three possible remedies: (1) going private; (2) admitting women; or (3) creating a separate institution for women. *VMI*, 976 F.2d at 900. We added "[w]hile it is not ours to determine, there might be other more creative options or combinations." *Id.* In the present case, the majority, after reiterating with favor the principles adopted in *VMI*, merely "blinks at" our *VMI* precedent in passing, choosing to distinguish *VMI* on the premise that the instant matter contains "time pressure" and "an absence of opportunity for Faulkner." Op. at 233. These distinctions simply do not compel, let alone permit, a federal court to usurp the state's sovereign right to devise and implement its own remedy *before* or *after* a constitutional violation is established.

In *Brown II*, the same "time pressure" and "absence of opportunity" undeniably existed for the black students who had been excluded from white public schools for at least a hundred years. Yet the Supreme Court refused to impose a particular remedy on those states which had unlawfully discriminated *even though* it operated under the rubric of strict scrutiny. Instead, the Court "required the defendants [to] make a prompt and reasonable start toward full compliance ...," ordering the school officials to proceed with "all deliberate speed" in devising a plan to admit those who had been discriminatorily denied entrance into the public schools. *Brown II*, 349 U.S. at 300, 301, 75 S.Ct. at 756, 756-57. Moreover, in *Swann*, the Court cautioned that "[j]udicial authority enters *only* when local authority defaults." *Swann*, 402 U.S. at 16, 91 S.Ct. at 1276 (emphasis added).[7]

---

[7] The majority's reliance on an "absence of opportunity" as a justification for depriving the State of South Carolina the rights which we afforded the Commonwealth of Virginia in *VMI* astounds me. As this panel

(Footnote continues on following page)

In my considered opinion, these principles preclude a federal court from imposing its own remedy, even on a preliminary basis, before the responsible state authorities have had an opportunity to devise and implement their own remedy. In the present case, South Carolina's General Assembly has initiated efforts to assess any purported constitutional flaws in its higher educational system by commissioning a ten-member committee to examine and report on the need for single-gender educational opportunities for women within the State. Because Faulkner's requested mandatory preliminary relief interrupts this remedial process and strips South Carolina of its right to devise and implement its own remedy, I would deny her request.[8]

(Footnote continued from preceding page)

cogently observed in its prior order, South Carolina's other state-funded institutions can provide Faulkner with the *same* educational opportunities as do day classes at The Citadel. *See*, *supra*, n. 2.

[8] Faulkner claims that, upon establishing a constitutional violation, our precedent requires us to grant preliminary relief. In support, Faulkner relies primarily on *Henry v. Greenville Airport Commission*, 284 F.2d 631, 633 (4th Cir.1960), where we held "[t]he district court has no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right." Assuming *arguendo* that Faulkner established a clear constitutional violation, a matter yet to be litigated and decided, I believe our holding in *Henry* does not mandate preliminary relief in the present case.

In *Henry*, we dealt with the exclusion of blacks from various waiting rooms within the Greenville Airport. Thus, in that case the remedy was clear: Greenville would have to abolish its discrimination and allow blacks equal access to the waiting rooms. Such a remedy could be implemented instantaneously. In contrast, the remedy in the present matter is not so clear, nor can it be implemented so quickly. Instead, our decision in *VMI* allows The Citadel to pursue several possible remedies once an equal protection violation is established. The Supreme Court recognizes this distinction when determining whether a state should be afforded an opportunity to devise and implement its own remedy for constitutional violations. *Watson v. City of Memphis*, 373 U.S. 526, 532, 83 S.Ct. 1314, 1318, 10 L.Ed.2d 529 (1963) ("Desegregation of parks and other recreational facilities does not

(Footnote continues on following page)

D

Public Interest

Remarkably, the majority fails to even address this prong of our preliminary injunction analysis. *Blackwelder Furn. Co.*, 550 F.2d at 194-97. For many of the reasons previously discussed, I believe the public interest would best be served by denying Faulkner's request for mandatory preliminary relief. As we have frequently noted, the public interest is best served by "preserving the status quo *ante litem* until the merits of a serious controversy can be fully considered by a trial court." *Maryland Undercoating Co. v. Paine*, 603 F.2d 477, 481 (4th Cir.1979). This principle applies with considerable force in the present case, because, at this stage, we have no showing of irreparable harm or a clear constitutional violation. Moreover, the public interest would be better served by refusing to "brush aside long-standing state ... practices" and impose a particular remedy without first affording South Carolina an opportunity to correct any deficiencies, if any exist, on its own. *Chisom*, 853 F.2d at 1189.[9]

(Footnote continued from preceding page)

present the same kinds of cognizable difficulties inhering in elimination of [discrimination] in schools."). Thus, when there are "a number of variables and several contingencies" involved in remedying a constitutional violation, a federal court must refrain from usurping the state's right to devise and implement its own remedy. *Chisom*, 853 F.2d at 1192.

[9] Even The Citadel acknowledges that, if its primary goal were to produce officers for the military, public interest would demand the integration of that institution. *The Citadel: A Case for Single Gender Education* (A. Mahan and T. Mahan) 1993 (J.A. 419). However, because "The Citadel's mission is clearly distinct from those of the four federal military academies ...," and utilizes the military environment only to effectuate its egalitarian and holistic goals, public interest demands that we preserve The Citadel's program until *after* a full trial on the merits. *Id.*

IV

For 150 years, The Citadel has duteously provided its Corps of Cadets with a unique educational experience, designed not only to provide a quality education, but also to develop character, honor and discipline. As we recognized in *VMI*, that experience hinges on the single-gender characteristic of The Citadel. Certainly, before The Citadel should be compelled to trash its tradition and exceptional educational experience, duty compels this court to afford The Citadel the right to present its argument in a full trial on the merits. Moreover, even if we were to conclude that The Citadel's longstanding tradition violates the Equal Protection Clause of the Fourteenth Amendment, our comity and federalism jurisprudence demand that we first provide the State of South Carolina the opportunity to create and implement its own remedy. Because the majority's decision blatantly ignores these requirements, I cannot join in its decision.

It follows that I would reverse.

APPENDIX F

Memorandum Decision of the Supreme Court of the United States

114 S.Ct. 872

James E. JONES, Jr., Chairman, Board of Visitors of The Citadel, et al., applicants,

v.

Shannon Richey FAULKNER, Individually and on behalf of others similarly situated, and the United States of America.

No. A-569.

Supreme Court of the United States

January 18, 1994

ORDER

UPON FURTHER CONSIDERATION of the application of counsel for the applicants, and the responses filed thereto,

IT IS ORDERED that the stay heretofore issued by the undersigned on January 12, 1994, be, and the same is hereby vacated. The application for stay is, in all respects, denied.

APPENDIX G

Order of the
United States Court of Appeals
For the Fourth Circuit

Shannon Richey FAULKNER, Individually
and on behalf of all others similarly situated;
United States of America, Plaintiffs-Appellees,
v.
James E. JONES, Jr., Chairman, Board of Visitors of
The Citadel, et al., Defendants-Appellants.

No. 94-1978.

United States Court of Appeals,
Fourth Circuit.

August 12, 1994

ORDER

Appellants' motion to stay, pending appeal, the district court's orders dated July 22, 1994, and August 1, 1994, incorporated into the judgment dated August 5, 1994, is granted. The Clerk is directed to advance this case on the calendar so that it may be argued during the December term in Richmond and to establish a briefing schedule that is consistent.

This order is entered by direction of Judge Niemeyer, with the concurrence of Judge Hamilton. For the reasons stated separately, Judge Hall would deny the motion for a stay and accordingly dissents from the granting of this order.

August 12, 1994

/s/ Paul V. Niemeyer

Paul V. Niemeyer
United States Circuit Judge

HALL, Circuit Judge, dissenting:

Justice delayed is justice denied.

By all rights, Ms. Faulkner should be preparing to enter her second full year of military instruction and training as a full-fledged member of the Corps of Cadets. South Carolina stubbornly maintains that a system, proved by the nation's service academies to work, is unworkable. Meanwhile, as Faulkner views the drill field from afar, the state continues to deny its daughters the education that is rightfully theirs under the Constitution of the United States.

That such a situation could be tolerated in the nineteenth century is not surprising, but we are about to embark on the twenty-first. In *Bradwell v. State*, 83 U.S. 130 (1872), the Supreme Court upheld a state's denial of a perfectly qualified woman's application to practice law. Mr. Justice Bradley, concurring, observed, "The natural timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." 83 U.S. at 141. Like many, if not most, prejudices about "the nature" of things, experience has put Mr. Justice Bradley's observation to rout. Someday, the spectacle of our handwringing over this case, whilst Ms. Faulkner's opportunity for a public education fritters away, will seem every bit as quaint as *Bradwell*. I would delay the inevitable no longer. I dissent, and would deny the stay.

No. 95-31

Supreme Court, U.S.
FILED
AUG 11 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

SHANNON RICHEY FAULKNER,

Petitioner,

and the

UNITED STATES OF AMERICA,

Respondent,

v.

JAMES E. JONES, JR., *et al.*,

Respondents/Petitioners.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

M. DAWES COOKE, JR.
BARNWELL, WHALEY, PATTERSON & HELMS
134 Meeting Street
Charleston, South Carolina 29402
(803) 577-7700

ROBERT H. HOOD
HOOD LAW FIRM
172 Meeting Street
P.O. Box 1508
Charleston, South Carolina 29402
(803) 577-4435

**Counsel of Record*

CHARLES J. COOPER*
MICHAEL A. CARVIN
VINCENT J. COLATRIANO
DAVID H. THOMPSON
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

CHARLES MOLONY CONDON
ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA
TREVA G. ASHWORTH
KENNETH P. WOODINGTON
CAMERON B. LITTLEJOHN, JR.
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-3970

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Faulkner v. Jones, 858 F. Supp. 552 (D.S.C. 1994) 3, 5

United States v. Virginia, 44 F.3d 1229 (4th Cir. 1995), *petition for cert. filed*, No. 94-1941 (Apr. 23, 1995) 3

United States v. Virginia, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2431 (1993) 3

COURT FILINGS

Petition for Writ of Certiorari in *United States v. Virginia*, No. 94-1941, filed Apr. 23, 1995 6

Brief for Commonwealth of Virginia in Opposition in *United States v. Virginia*, No. 94-1941, filed June 23, 1995 7

No. 95-31

In The

Supreme Court of the United States

October Term, 1995

SHANNON RICHEY FAULKNER,

Petitioner,

and the

UNITED STATES OF AMERICA,

Respondent,

v.

JAMES E. JONES, JR., *et al.*,

Respondents/Petitioners.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION

Respondents James E. Jones, Jr., The Citadel, the Military College of South Carolina ("The Citadel"), and the State of South Carolina, *et al.*, (collectively "respondents") respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit filed on July 10, 1995 by petitioner Shannon Richey Faulkner ("Faulkner").

COUNTERSTATEMENT OF THE CASE

Respondents have today filed their own petition for a writ of certiorari seeking review of the court of appeals' decision. Our petition details the relevant facts of this case. Because Faulkner's statement, however, misstates certain important information concerning the factual and legal background of this case, and in certain important respects mischaracterizes the record, we present a short counterstatement devoted solely to correcting Faulkner's material misstatements and mischaracterizations.

1. Without citing any support in the record, Faulkner asserts that The Citadel's "experts admit that the admission of women would not impair the ability of the college to fulfill its mission." Faulkner Pet. at 25. Although one of respondents' witnesses, General Goodpasteur, acknowledged in a deposition that there would be some beneficial aspects to admitting women to The Citadel, he clearly opposed coeducation of The Citadel because the loss of the benefits of single-sex education outweighed any potential benefits. Deposition of Andrew Goodpasteur at 112, 151. Thus, far from constituting an "admission" that coeducation would not impair fulfillment of The Citadel's missions, General Goodpasteur highlighted the inherent difficulties that would face The Citadel in attempting to fulfill its mission if it were coeducational.[1] In any event, the district court specifically

---

[1] To the extent the plaintiffs base their contentions on the testimony of Dr. Richard Richardson, their reliance is misplaced. Dr. Richardson testified that while The Citadel might be able to fulfill one of its missions, such as creating citizen soldiers, if it were coeducational, he correctly pointed out that this

limited the trial in this case to the question whether South Carolina was justified in not offering an all-female military program like The Citadel to women. The district court thus accepted for purposes of the trial proceedings the findings affirmed in the Fourth Circuit's prior decisions in a case involving a virtually identical challenge to the males-only admission policy of the Virginia Military Institute ("VMI"). *United States v. Virginia*, 976 F.2d 890 (4th Cir. 1992) (*VMI I*), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2431 (1993); *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995) (*VMI II*), *petition for cert. filed*, No. 94-1941 (April 23, 1995). Because the district court accepted the Fourth Circuit's findings in *VMI I* and *VMI II* that the substantial pedagogical benefits of single-sex education would be lost if women were admitted to VMI, The Citadel did not offer its own evidence that would have established its inability to fulfill its mission if it were coeducated. *Faulkner v. Jones*, 858 F. Supp. 552, 555 (D.S.C. 1994) (Faulkner Pet. at 34a-36a).

2. Faulkner mischaracterizes the record below by asserting, "The Citadel admits that women could perform just as well as male cadets and would benefit tremendously from its rigorous military-style program." Faulkner Pet. at 4. The testimony of the two witnesses they cite does not support this statement. Norman Doucet, a student at The Citadel, merely acknowledged the obvious

---

is not the "exclusive mission" of The Citadel. J.A. 757. Faulkner fails to mention that Dr. Richardson also testified that with coeducation and the changes necessary to accommodate women, The Citadel would "become over time a different place." May 23, 1994 Hearing at 49 (morning session), 75-76 (afternoon session).

fact that women could "handle" minute regulation, challenging academics and a rigorous honor code. J.A. 237. Similarly, Dr. Richardson merely acknowledged that it was not his contention that there were *no* women who could fulfill The Citadel's requirements. In any event, Faulkner's contention ignores the underlying issue, of fundamental importance, that regardless of the ability of females to meet some or all of the requirements of The Citadel, the mere presence of women will destroy the homogeneity of the Corps of Cadets that is necessary to ensure the pedagogical benefits of a single-gender education. To the extent Faulkner is suggesting that it is somehow our position that there are no women who could perform at The Citadel or who would benefit from its program, which we are not asserting, Faulkner simply misses the point.

3. The Petitioner also asserts that the "Commissioner of Higher Education conceded at trial that the exclusion of women from The Citadel violates the state policy of providing equal educational opportunities for women." Faulkner Pet. at 6. Although Robert Gallager, the Commissioner of Higher Education, stated that, in a "narrow sense," J.A. 594, The Citadel's single-gender admissions policy was "somewhat inconsistent," J.A. 604, with the State's policy of providing equal educational opportunity, he made clear that this was merely the inevitable result of the fact that the State has several important educational policies that are at times mutually exclusive, such as offering a wide diversity of programs and responding to student demand in a way that maximizes scarce resources. J.A. 602-605.

4. Faulkner also is incorrect in asserting that "the district court made no finding that South Carolina had a policy of providing single-sex education." Faulkner Pet. at 6. In fact, the district court found that South Carolina follows a policy of diversity in higher education, and that "[d]iversity as the term refers to post-secondary education in South Carolina refers to diversity of educational programs or different kinds and types of programs, including two-year programs versus four-year programs and single-gender versus coeducational." *Faulkner*, 858 F. Supp. at 559 (Faulkner Pet. at 43a).

5. Faulkner also claims that respondents did not offer at trial "any evidence as to the number of women interested in attending a single-sex college." Faulkner Pet. at 6. This statement not only mischaracterizes the record, it ignores the district court's own findings. As we have outlined in our petition for writ of certiorari, the undisputed evidence offered by respondents at trial demonstrated that the current absence of an all-female military program like The Citadel results not from intentional discrimination against women in higher education, but from an absence of any significant demand on the part of women to support such an institutional program. Moreover, the district court found as a fact that "[t]here does not appear to be any substantial interest in South Carolina for the establishment of an all-female military institution like The Citadel." *Faulkner*, 858 F. Supp. at 560 (Faulkner Pet. at 46a).

REASONS FOR DENYING THE WRIT

Faulkner's petition is confined to the constitutional adequacy of the *remedy* ordered by the courts below. She seeks review only of the question whether the courts below erred in permitting respondents to remedy the equal protection violation that they found by allowing respondents to provide to women, through the creation of the South Carolina Institute of Leadership for Women ("SCIL"), a publicly supported, single-gender program of undergraduate education with military training, whose classes start this September.[2] Faulkner's petition for writ of certiorari thus seeks review of the same remedial issue raised in the currently pending petition for writ of certiorari filed by the United States on May 26, 1995, in the *VMI* case. Petition for Writ of Certiorari, *United States v. Virginia* (April 23, 1995) (No. 94-1941).

Respondents have on this date filed their own petition for certiorari seeking review of the court of appeals' decision in this case. Unlike Faulkner's petition, however, our petition seeks review, not of the court of appeals' decision on the fact-specific question of the adequacy of the remedy ordered by the courts below, but rather of two issues relating to the court of appeals' decision on liability. Thus, the truly certworthy questions presented

---

[2] That Faulkner's petition is limited to this remedial question is also made clear in Faulkner's August 10 Opposition to our Application for Stay pending the filing of our own petition for certiorari: "On July 10, 1995, Shannon Faulkner filed a petition for certiorari seeking review of the remedial aspect of the decision permitting South Carolina to remedy the unconstitutional exclusion of women by creating a separate and intentionally unequal program for women." Opposition at 13.

by this case are: (1) did the courts below exceed their jurisdiction in this case by reaching the issue of whether the absence of an all-female military program like The Citadel is constitutionally justified; and (2) if the courts below did have jurisdiction over this issue, does a demonstrated and undisputed lack of any demand for an all-female military educational program like The Citadel provide a constitutionally adequate justification for the state's failure to establish such a program. For the reasons set forth in our petition for writ of certiorari, these questions satisfy this Court's standards governing review on writ of certiorari (*see* Rule 10 of the Rules of this Court). The remedial question presented by Faulkner's petition, however, is not worthy of this Court's plenary review. In this regard, we endorse and rely upon the points made by the respondents in the *VMI* case in their Brief in Opposition to the petition for certiorari filed by the United States in that case. *See, e.g.*, Brief for the Commonwealth of Virginia, *et al.* in Opposition, *United States v. Virginia* (June 23, 1995) (No. 94-1941).

CONCLUSION

For the reasons stated herein, Faulkner's petition for a writ of certiorari should be denied.

Respectfully submitted,

M. Dawes Cooke, Jr.
Barnwell, Whaley, Patterson & Helms
134 Meeting Street
Charleston, South Carolina 29402
(803) 577-7700

Robert H. Hood
Hood Law Firm
172 Meeting Street
P.O. Box 1508
Charleston, South Carolina 29402
(803) 577-4435

*Counsel of Record

Charles J. Cooper*
Michael A. Carvin
Vincent J. Colatriano
David H. Thompson
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Charles Molony Condon
Attorney General for the State of South Carolina
Treva G. Ashworth
Kenneth P. Woodington
Cameron B. Littlejohn, Jr.
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-3970

Dated: August 11, 1995

Supreme Court, U.S.
FILED
SEP 6 1995
CLERK

No. 95-31

In the Supreme Court of the United States

OCTOBER TERM, 1995

SHANNON RICHEY FAULKNER, PETITIONER

v.

JAMES E. JONES, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a State that provides a rigorous military-style educational program for men can remedy the unconstitutional denial of the same opportunity to women by offering them a different type of single-sex educational program deemed more suited to the average woman.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	6
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Faulkner v. *Jones*, No. 2:93-488-2 (D.S.C. July 24, 1995)	5
United States v. *Commonwealth of Virginia*:	
852 F. Supp. 471 (W.D. Va. 1994), aff'd, 44 F.3d 1229 (4th Cir. 1995), petition for cert. pending, No. 94-1941	3
976 F.2d 890 (4th Cir. 1992), cert. denied, 113 S. Ct. 2431 (1993)	2, 3, 7, 8
44 F.3d 1229 (4th Cir. 1995), petition for cert. pending, No. 94-1941	3, 4

Constitution, statute and rule:

U.S. Const.:	
Amend. XIV	2
Equal Protection Clause	2, 4
42 U.S.C. 2000c-6	2
Sup. Ct. Rule 12.4	3

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-31

SHANNON RICHEY FAULKNER, PETITIONER

v.

JAMES E. JONES, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 51 F.3d 440. The opinion of the district court (Pet. App. 33a-66a) is reported at 858 F. Supp. 552.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1995. The petition for a writ of certiorari was filed on July 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Citadel is a state college for men in Charleston, South Carolina. Petitioner applied for and was accepted to The Citadel's freshman class for the 1993-1994 school year, but The Citadel revoked her acceptance when it learned that she was female. Pet. App. 2a, 36a-37a, 71a-72a. On March 2, 1993, she filed suit, seeking an order admitting her to The Citadel and permanently enjoining its males-only admissions policy as a violation of the Equal Protection Clause of the Fourteenth Amendment. On May 28, 1993, petitioner filed a motion for class certification, which remains pending. In June, 1993, the United States intervened as a plaintiff pursuant to 42 U.S.C. 2000c-6. Pet. App. 34a.

2. Following a bench trial on the merits, and in light of the court of appeals' decision in *United States* v. *Commonwealth of Virginia*, 976 F.2d 890 (4th Cir. 1992) (*VMI I*), cert. denied, 113 S. Ct. 2431 (1993), the district court on July 22, 1994, held that The Citadel's males-only admissions policy violated the Equal Protection Clause. Pet. App. 33a-66a.[1] In order to ensure that the violation of petitioner's rights was remedied notwithstanding the additional time that might be required to implement a remedy for other women, the court ordered petitioner's immediate admission to The Citadel Corps of Cadets. *Id.* at 62a-

---

[1] On August 17, 1993, the district court had granted petitioner's motion for a preliminary injunction permitting her to attend The Citadel as a day student, Pet. App. 69a, and the court of appeals affirmed that order on November 17, 1993, *id.* at 70a-100a. She continued to be excluded, however, from the Corps of Cadets, the military-style co-curricular component that is the central feature of The Citadel's educational program.

63a. Insofar as the rights of other women were concerned, respondents[2] were given until the start of the 1995-1996 school year to formulate and implement a remedial plan conforming with the Equal Protection Clause. *Id.* at 65a.

3. On August 12, 1994, the court of appeals stayed petitioner's admission to the Corps of Cadets pending respondents' appeal of the district court's liability determination. Pet. App. 102a-103a. On April 13, 1995, the court of appeals affirmed as to liability, *id.* at 1a-32a, but modified the district court's remedial order, *id.* at 18a. The court applied the remedial standards it had announced in *VMI I* and *VMI II*.[3] Although the

---

[2] As used in this brief, the term "respondents" refers to the respondents other than the United States (a respondent under this Court's Rule 12.4).

[3] In *VMI I*, the court of appeals held that, to remedy its constitutional violation, the Commonwealth of Virginia

> might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution. While it is not ours to determine, there might be other more creative options or combinations.

976 F.2d at 900. Virginia elected to create the Virginia Institute for Leadership (VWIL), a separate program exclusively for women at Mary Baldwin College, a private, women's liberal arts college in Staunton, Virginia. The district court approved the VWIL program, and the court of appeals in *VMI II* affirmed, holding that, notwithstanding that VWIL " 'differs substantially' from the educational program offered at VMI," it is "substantively comparable" to VMI and therefore constitutionally adequate. *United States* v. *Commonwealth of Virginia*, 44 F.3d 1229, 1235, 1237 (4th Cir. 1995) (*VMI II*), quoting *United States* v. *Commonwealth of Virginia*, 852 F.

court noted that South Carolina had already had substantial time to devise a remedy and had failed to do so, it held that the district court should give the State "reasonable" additional time beyond the start of the 1995-1996 school year to put its remedial plan in place. *Id.* at 14a-15a. The court emphasized that the State should have the opportunity in the first instance to devise a remedial plan to bring its higher education system into compliance with the Equal Protection Clause, and identified some of the remedial alternatives it viewed as acceptable:

> If [South Carolina] elects to maintain single-gender education at The Citadel, then it must provide parallel programs for men and women that are substantively comparable. *See VMI II.* Alternatively, the state may adopt a coeducational policy for The Citadel, or it may withdraw state support from The Citadel and permit that institution to continue as a private institution.

Id. at 14a. The court of appeals also modified the district court's order requiring that The Citadel immediately admit petitioner to the Corps, instead ordering her admission only "if the state is unable to accomplish an acceptable alternative plan by August 1995." *Id.* at 18a.

4. On June 5, 1995, respondents filed a remedial plan in district court in which they proposed the creation of a "parallel" program exclusively for women to be called the South Carolina Institute of Leadership for Women (SCIL) at Converse College,

---

Supp. 471, 473 (W.D. Va. 1994). The petition of the United States for a writ of certiorari in *VMI* is pending. *United States* v. *Commonwealth of Virginia*, No. 94-1941 (filed May 26, 1995).

a private, women's college in Spartanburg, South Carolina. *Faulkner* v. *Jones*, No. 2:93-488-2 (D.S.C. July 24, 1995), slip op. 3. The plan proposes to follow an approach similar to that reflected in the Mary Baldwin College plan Virginia approved in *VMI II*. Petitioner and the United States sought discovery regarding the Converse College plan.

5. Meanwhile, on July 12, 1995, petitioner filed the current petition for a writ of certiorari, seeking review of the court of appeals' judgment allowing respondents to exclude her from The Citadel if they devised a "substantively comparable" females-only alternative.

6. Remedial proceedings continued in the district court. On July 24, 1995, the district court held a hearing at which it found that respondents had deliberately withheld discovery information, had failed to respond properly to discovery requests in violation of the court's rules, and had otherwise slowed the discovery process. *Faulkner* v. *Jones*, *supra*. The court concluded that respondents' conduct made timely consideration of their remedial plan impossible, and that admission of petitioner to the Corps was the only effective remedial alternative for her. The court set an October 15, 1995, discovery cutoff and a November 6, 1995, trial date. Slip op. 12.

7. Respondents unsuccessfully applied to the court of appeals, and then to this Court, for a stay of petitioner's admission to the Corps of Cadets pending their filing of a petition for a writ of certiorari seeking review of the court of appeals' April 13, 1995, decision. On August 11, 1995, respondents filed such a petition. *Jones* v. *Faulkner*, No. 95-258.

8. Petitioner joined The Citadel Corps of Cadets when The Citadel's 1995-1996 school year began on

August 12, 1995. On August 18, 1995, however, petitioner withdrew from the Corps of Cadets. By motion dated August 31, 1995, Nancy Mellette, a high school senior and resident of South Carolina who wishes to attend The Citadel, moved to intervene as a plaintiff in this action and to renew petitioner's motion for class certification.

DISCUSSION

The court of appeals held that respondents constitutionally could adopt one of several remedial alternatives, and petitioner seeks review of the option that respondents have elected to pursue: The establishment of a separate, single-sex women's program "parallel" to The Citadel. The United States agrees with petitioner that the equal protection violation in this case cannot adequately be remedied by the creation of a college program exclusively for women. As we have argued in our petition for a writ of certiorari in *United States* v. *Commonwealth of Virginia*, No. 94-1941 (*VMI*), such a remedial alternative in the circumstances of these two cases is inconsistent with established equal protection principles and presents an issue of importance calling for this Court's review.

Respondents' proposed parallel program for women at Converse College has not, however, been reviewed or approved by the district court or the court of appeals. On July 24, 1995, the district court set an October 15, 1995, cut-off date for discovery regarding the Converse College remedial proposal, and ordered that a trial on remedy begin on November 6, 1995. The district court has not yet had an opportunity to make factual findings regarding respondents' proposed separate program for women. And it is

uncertain whether the district court or the court of appeals will find that separate program to be constitutionally adequate even under the lenient standard the court of appeals announced in *VMI II*. If the remedy chosen by respondents does not pass muster, respondents will have to adopt an alternative remedy, such as relinquishment of government funding or adoption of a sex-neutral admissions policy at The Citadel.

Review by this Court of the constitutional adequacy of the Converse College remedy thus would appear to be premature at this time.[4] This Court will, in all events, have an opportunity to review and decide the central issues in this case before the next school year begins, because the same issues are presented in the United States' pending petition for a writ of certiorari in *VMI*, No. 94-1941.[5]

---

[4] In addition, petitioner's withdrawal from The Citadel renders her individual claim moot. Although another female candidate for The Citadel seeks to intervene as a plaintiff, the prematurity of the petition, for the reasons stated above, would be unaffected by such intervention.

[5] Petitioner asserts (Pet. 25-26) that there are material differences in the records in the two cases. The *VMI* record, however, presents no impediment to this Court's review of the question presented by petitioner in this case. Petitioner asserts (Pet. 25) that, "where the trial court in [*VMI I*] found that the admission of women to VMI would destroy its military program, * * * there was no such finding in the Citadel case." The admission of women would, however, have no greater impact on VMI than on The Citadel. Women's admission would not destroy either school; the court of appeals expressly held in *VMI*, as in this case, that admission of women was a feasible remedial alternative. *VMI I*, 976 F.2d at 900; see 94-1941 Pet. at 28-29 and 94-1941 Reply Br. at 6-8. Petitioner also suggests (Pet. 25) that respondents' concession that some women are qualified

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys

SEPTEMBER 1995

---

to attend The Citadel distinguishes this case from *VMI*. Contrary to that suggestion, however, the lower courts in *VMI* found that some women could fulfill all of VMI's requirements. *VMI I*, 976 F.2d at 896; see 94-1941 Pet. at 4 and 94-1941 Reply Br. at 4. With regard to "the issue of whether single-sex education has pedagogical value" (Pet. 25), the records in the two cases are the same as well because the district court in this case provisionally accepted the findings in *VMI* on that issue. Pet. App. 36a & n.5. Petitioner further asserts (Pet. 25-26) that the cases differ in that South Carolina has a statute ensuring equal access and educational opportunities for all citizens. However, Virginia, too, has an official policy of providing higher education "without regard to sex, race, or ethnic origin." *VMI I*, 976 F.2d at 899.

No. 95-31

Supreme Court, U.S.
FILED
FEB 29 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

SHANNON RICHEY FAULKNER,

Petitioner,

and the

UNITED STATES OF AMERICA,

Respondent.

v.

JAMES E. JONES, JR., *et al.*,

Respondents/Petitioners.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MEMORANDUM SUGGESTING MOOTNESS OF PETITION FOR WRIT OF CERTIORARI OF SHANNON RICHEY FAULKNER

M. Dawes Cooke, Jr.
Barnwell, Whaley, Patterson & Helms
134 Meeting Street
Charleston, South Carolina 29402
(803) 577-7700

Robert H. Hood
Hood Law Firm
172 Meeting Street
P. O. Box 1508
Charleston, South Carolina 29402
(803) 577-4435

**Counsel of Record*

Charles J. Cooper*
Michael A. Carvin
Vincent J. Colatriano
David H. Thompson
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Charles Molony Condon
Attorney General for the State of South Carolina
Treva G. Ashworth
Kenneth P. Woodington
Cameron B. Littlejohn, Jr.
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-3970

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23 pp

TABLE OF CONTENTS

Page

STATEMENT 2

ARGUMENT 2

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Church of Scientology v. United States, ___ U.S. ___, 113 S.Ct. 447 (1992) 4

CIA v. Holy Spirit Ass'n, 455 U.S. 997 (1982)..... 8

Deakins v. Monaghan, 484 U.S. 193 (1988) 8

DeFunis v. Odegaard, 416 U.S. 312 (1974).....4, 6

Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995)..... 2

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 5

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941) 5

Murphy v. Hunt, 455 U.S. 478 (1982)..... 6

North Carolina v. Rice, 404 U.S. 244 (1971) 4

O'Shea v. Littleton, 414 U.S. 488 (1974)..... 5

Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) 4

Preiser v. Newkirk, 422 U.S. 395 (1975)..... 4

SEC v. Medical Comm. for Human Rights, 404 U.S. 403 (1972)..... 3

Steffel v. Thompson, 415 U.S. 452 (1974)..... 3

United States v. Munsingwear, 340 U.S. 36 (1950) 8

United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980)..... 7

Weinstein v. Bradford, 423 U.S. 147 (1975).....4, 6

RULES

S. Ct. R. 21.2(b) 1

No. 95-31

In The

Supreme Court of the United States

October Term, 1995

SHANNON RICHEY FAULKNER,

Petitioner,

and the

UNITED STATES OF AMERICA,

Respondent.

v.

JAMES E. JONES, JR., *et al.*,

Respondents/Petitioners.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MEMORANDUM SUGGESTING MOOTNESS OF PETITION FOR WRIT OF CERTIORARI OF SHANNON RICHEY FAULKNER

Pursuant to Rule 21.2(b) of this Court's Rules, respondents James E. Jones, Jr., *et al.*, ("Respondents") file this memorandum to advise the Court of certain facts which, in Respondents' view, render the writ of certiorari filed by petitioner Shanon Richey Faulkner moot.

STATEMENT

On July 10, 1995, Faulkner petitioned this Court to review the Fourth Circuit's decision in *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995), holding that the State of South Carolina's failure to provide women an all-female military education substantively comparable to that offered to men at The Citadel violated the Equal Protection Clause. In light of Faulkner's unique status as a rising college junior, the court fashioned a bifurcated remedy. The court provided "special, conditional relief for Faulkner, requiring that she be admitted to the Corps of Cadets unless, before the beginning of Faulkner's junior year, the state provide[d] a parallel program [for women]." 51 F.3d at 450. As for all other women, the State was allowed to formulate its own remedy that would offer women an educational experience substantively comparable to that which the State provided for men.

Accordingly, on August 12, 1995, Faulkner arrived at The Citadel as a prospective member of the Corps of Cadets. On August 18, 1995, however, Faulkner voluntarily withdrew from The Citadel.

ARGUMENT

Clearly, Faulkner's voluntary withdrawal from The Citadel has removed any personal stake that she had in this matter. Her lawyers admit that she "is not currently pursuing a Citadel education" and is not even "interested" in doing so. Motion of Nancy Mellette to Add Party or to Intervene, dated September 11, 1995, at 5, 17a.

Still, while her lawyers acknowledge "the potential argument that her claims are moot" – an understatement, to say the least – and concede that her petition is "endangered," Motion of Nancy Mellette at 5, 8, they refuse to dismiss her petition for certiorari and, indeed, have argued in the district court that her claim for admission to The Citadel, despite her voluntary withdrawal, is not moot and should therefore not be dismissed.[1] As the United States in its capacity as plaintiff-intervenor has succinctly stated, "petitioner's [Faulkner's] withdrawal from The Citadel renders her individual claim moot." Memorandum for the United States in Opposition at 7 n.4, *Faulkner v. Jones* (No. 95-31).

Under Article III of the United States Constitution, "[i]t is well settled that federal courts may act only in the context of a justiciable case or controversy." *SEC v. Medical Comm. for Human Rights*, 404 U.S. 403, 407 (1972) (quoting *Benton v. Maryland*, 395 U.S. 784, 788 (1969)). If there is no actual controversy between the litigants, a case is by definition moot and therefore not justiciable. As the Court has explained, "[t]he rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 460 n.10 (1974). Accordingly, the Court has repeatedly held that a case is moot

---

[1] Acknowledging the potential mootness of Faulkner's petition, Faulkner's lawyers have filed a motion seeking leave of this Court to effectively substitute another person as their petitioner in these proceedings. As we shall demonstrate in our forthcoming opposition to this motion, Faulkner's lawyers cannot resuscitate Faulkner's mooted petition, and their motion should be rejected.

where a subsequent change in the relevant facts or law negates the existence of an actual controversy. *See, e.g., Weinstein v. Bradford,* 423 U.S. 147 (1975) (plaintiff's challenge to certain procedural rights in considering parole eligibility were moot on account of his complete release from supervision); *Preiser v. Newkirk,* 422 U.S. 395 (1975) (plaintiff's due process challenge to the adequacy of procedures for transferring prisoners to maximum security facilities rendered moot by his subsequent transfer to a medium security prison); *North Carolina v. Rice,* 404 U.S. 244, 246 (1971) (plaintiff's challenge to a drunk-driving sentence after he had been completely discharged was moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them"); *DeFunis v. Odegaard,* 416 U.S. 312, 317 (1974) (student's challenge to state law school's admissions policy rendered moot by his registering for the final quarter of law school since "[t]he controversy between the parties has thus clearly ceased to be 'definite and concrete' and no longer 'touch[es] the legal relations of parties having adverse legal interests' ") (quoting *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240-41 (1937)); *Pasadena City Bd. of Educ. v. Spangler,* 427 U.S. 424, 430 (1976) (equal protection challenge to the racial composition of local public schools "clearly moot" since plaintiff students had graduated and "no longer ha[d] any stake in [the case's] outcome"); *Church of Scientology v. United States,* ___ U.S. ___, 113 S.Ct. 447, 449 (1992) ("[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to

a prevailing party, the appeal must be dismissed") (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

As previously mentioned, Faulkner has opposed a motion filed in the district court to dismiss her claim as moot. Faulkner's opposition is based on her assurances that if women were admitted to The Citadel, she would "consider re-applying." Affidavit of Shannon Faulkner ("Faulkner aff."), dated September 12, 1995, attached to Memorandum in Opposition to Motion to Dismiss Plaintiff Faulkner ("Memorandum") (App. 7). She argues that she still has a personal stake in the outcome of this litigation because she *may* seek readmission at some unspecific time in the future if, but only if, other women are admitted. Memorandum at 2 (App. 2). Under Article III, however, a justiciable controversy must be current and cannot be predicated on mere speculation that such a controversy may arise in the future. *See, e.g., O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (a plaintiff's injury "must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' ") (quoting *Golden v. Zwickler*, 394 U.S. 103, 109 (1969); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (alleged injury must be "actual or imminent,' not 'conjectural' or 'hypothetical' ") (quoting [*Whitmore v. Arkansas*, 495 U.S. 149, 155 (1991)] (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983))). Thus, despite Faulkner's assurance in the district court that, although she does "not know where the future leads," Faulkner Aff. at 2 (App. 7), it may someday lead her to seek admission to The Citadel, her petition is moot since she "is not currently interested in pursuing a

Citadel education." Motion of Nancy Mellette to Intervene at 17a.

Faulkner has also argued in the district court that her case falls within the exception to the mootness doctrine for controversies that are "capable of repetition, yet evading review." *DeFunis*, 416 U.S. at 318 (quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)); Memorandum at 3 (App. 3-4). Yet, this exception applies only where "two elements combine: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein*, 423 U.S. at 149. Faulkner cannot satisfy either element. The alleged constitutional violation, denial of admission to The Citadel, extends over four years and as the history of this case demonstrates will not evade review. Furthermore, Faulkner has failed to demonstrate with any degree of certainty that she will again seek admission to The Citadel. *See, e.g., Murphy v. Hunt*, 455 U.S. 478, 482 (1982) ("The Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the test stated in *Weinstein*."). Not surprisingly, Faulkner is unable to cite any authority to support her remarkable suggestion that a plaintiff who voluntarily renounces the relief she sought (and received) may continue to litigate the case because she *may* again be denied that relief *if* she someday renews her claim.

Faulkner also claims to have a personal stake in this case because there is a motion pending in the district

court for certification of a class. (App. 3). To support this proposition, Faulkner cites *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980). *Geraghty*, however, merely held that a denial of class certification may be appealed even after the named plaintiff's individual claim becomes moot. The *Geraghty* Court made clear that a plaintiff who has no personal stake in the outcome of the case at the time the class certification request is decided cannot prevent the mootness of the action. 445 U.S. at 404 n.11. Thus, *Geraghty* expressly precludes the result Faulkner seeks to achieve.

CONCLUSION

For the foregoing reasons, Respondents suggest that Faulkner's request for review is moot and her petition for a writ of certiorari should therefore be dismissed.[2]

M. Dawes Cooke, Jr.
Barnwell, Whaley,
Patterson & Helms
134 Meeting Street
Charleston, South Carolina
29402
(803) 577-7700

Robert H. Hood
Hood Law Firm
172 Meeting Street
P. O. Box 1508
Charleston, South Carolina
29402
(803) 577-4435

*Counsel of Record

Charles J. Cooper*
Michael A. Carvin
Vincent J. Colatriano
David H. Thompson
Shaw, Pittman, Potts
& Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Charles Molony Condon
Attorney General for the
State of South Carolina
Treva G. Ashworth
Kenneth P. Woodington
Cameron B. Littlejohn, Jr.
P. O. Box 11549
Columbia, South Carolina
29211
(803) 734-3970

---

[2] Alternatively, the Court may wish, in light of the mootness of Faulkner's claims, to grant Faulkner's petition, vacate the court of appeals' judgment insofar as it relates exclusively to Faulkner and provides relief unique to Faulkner, and partially remand to the court of appeals with directions that it instruct the district court to dismiss those aspects of this case as moot. *See United States v. Munsingwear*, 340 U.S. 36 (1950). *See also Deakins v. Monaghan*, 484 U.S. 193, 199-200 (1988); *CIA v. Holy Spirit Ass'n*, 455 U.S. 997 (1982).

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

SHANNON RICHEY FAULKNER, individually and on behalf of all others similarly situated, Plaintiff-Intervenor, v. and the UNITED STATES of AMERICA, Plaintiff-Intervenor, v. JAMES E. JONES, Jr., et al. Defendants, and the STATE OF SOUTH CAROLINA, et al., Additional Defendants.	CASE NO. 2:93-0488-2 MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS PLAINTIFF FAULKNER

Defendants maintain that with Plaintiff Faulkner entering and withdrawing from the Corps of Cadets in August of 1995, the claims she presented are moot. While Plaintiff filed her claim as a class action and has made motions to certify the case at different times, there has been no ruling as to class certification. The Defendants claim that since the class is not yet certified and the injunctive rulings have applied solely to Plaintiff Faulkner despite her request for class relief, she should be dismissed from this case.

Plaintiff submits that her case is not moot for two reasons: (1) Plaintiff still has a legally cognizable interest in the outcome; and (2) extraordinary conditions exist which negate Defendant's claims of mootness.

(a) Plaintiff Faulkner still has a legally cognizable interest in the outcome of this litigation.

A case may become moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496 (1969). In the case at hand, it is clear the issues are still "live" since the United States itself is a plaintiff-intervenor and another individual (Nancy Mellette) seeks to intervene, and no party to this case contends that the underlying legal issue of discrimination by Defendants is resolved. Additionally, Plaintiff Faulkner asserts that she still has a legally cognizable interest in the outcome of this suit. While Faulkner initially withdrew from The Citadel on August 18, 1995, Faulkner contends that males who have withdrawn from The Citadel have been re-admitted. In her Affidavit (See Exhibit A, Affidavit of Shannon Richey Faulkner), Faulkner states that she is still interested in attending and graduating from The Citadel, but would not re-apply without the presence of other women. Faulkner, like males who withdraw from The Citadel, has the right to re-apply for admission. The Citadel implies that because Faulkner withdrew she forfeited her right to re-enter, which is not the case. In fact, this interpretation perpetuates the Defendants' policy of treating males different from females.

Additionally, Faulkner still has an interest in the class action aspect of this case, which has yet to be ruled upon. In Defendant's motion to dismiss Faulkner, they rely upon *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 430 (1976). However, in *United States Parole Commission v. Geraghty*, 445 U.S. 387, note 7 (1980) the Supreme Court limited the holding of *Pasadena* to the facts presented.

The case is not moot. A controversy still exists in Faulkner's right to be afforded the same rights entitled to males at The Citadel, including the right to attend, the right to withdraw, and the right of re-admission.

(b) Extraordinary conditions exist which negate Defendants' claim of mootness.

Federal Courts have long recognized that cases raising substantial issues should not be dismissed for technical jurisdictional reasons where the only effect of the dismissal is simply the renewal of the lawsuit. See *United States v. W.T. Grant Co.*, 345 U.S. 629 (1983). For instance, in *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911), the Supreme Court held an action over an expired order was not moot since the issues were "capable of repetition, yet evading review" 219 U.S. at 515. The Supreme Court used similar reasoning in *Moore v. Ogilive*, 394 U.S. 814 (1969) to declare a "continuing controversy" existed regarding candidates in a prior election and rejected arguments of mootness. 394 U.S. at 816.

There can be no question that the issues presented are "capable of repetition, yet evading review" due to the hundreds of inquiries from women who The Citadel will

not even let apply due to their gender. Lastly, Faulkner's personal situation is capable of direct repetition. Should Faulkner seek re-admission, as stated in her affidavit, she would be forced to re-institute litigation to secure equal rights in the re-admission process.

No one can dispute that Faulkner entered and left the Citadel under unique, difficult and novel circumstances. Faulkner asserts that she has a continuing interest in this case and that the equities mandate her remaining a party. For the foregoing reasons, Defendants' motion to dismiss Faulkner as a party should be denied.

Henry Weisburg
Thomas Swift
Mary Warren
Vanessa Beever
SHEARMAN & STERLING
Citicorp Center
153 East 53rd St.
New York, New York 10036

Valorie K. Vojdik
New York University School of Law
137 MacDougal Street
New York, New York 10012-1096

/s/ Suzanne E Coe
Suzanne E. Coe
ARNOLD & COE, L.L.P.
408 N. Church Street, Suite C
Greenville, S.C. 29601

Robert R. Black
23 Broad Street
P.O. Box 643
Charleston, S.C. 29402

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

SHANNON RICHEY FAULKNER, individually and on behalf of all others similarly situated, Plaintiff-Intervenor, v. and the UNITED STATES of AMERICA, Plaintiff-Intervenor, v. JAMES E. JONES, Jr., et al. Defendants, and the STATE OF SOUTH CAROLINA, et al., Additional Defendants.	CASE NO. 2:93-0488-2

AFFIDAVIT OF SHANNON RICHEY FAULKNER

Shannon Richey Faulkner, being duly sworn, states the following:

1. I am the Plaintiff in this action. I filed this action as a class action on behalf of myself and other women similarly situated. In August of 1995, I was admitted to the Citadel and withdrew from the Citadel on August 18, 1995. I withdrew due to severe stress from the situation. Due to stress, I could not keep my food in my stomach. Much of this stress was from the litigation itself. However, a great deal of stress was from being the only

woman at the Citadel, the constant presence of the press, and the feeling that the entire world judged every mistake, mishap and movement I made. From this stress and the feeling that I could not trust anyone with my feelings since the persons surrounding me in the infirmary had testified against my admission. I really could not foresee any situation changing. Being this upset, I chose to withdraw from The Citadel. Even the process of deciding to stay or leave added stress;

2. When I decided to withdraw, I knew that I was under a great deal of stress. I have never been so emotional in my life. Looking back, I cannot believe how the situation evolved into emotional catastrophe for me. I usually am not very emotional and try to avoid making decisions based upon my feelings. I did not want to make a final decision to leave the Citadel, and knew that my state of mind was not rational. I asked General Poole if I could have a medical discharge to see another doctor and seek another medical opinion (besides the opinion of Dr. Robinson, who testified against me even being there and submitted an affidavit attempting to block my admission). General Poole told me that this was not an option.

3. Under the circumstances, I believe it was the best thing for me to withdraw from the Citadel. However, I do believe that the Citadel was not truly interested in my staying. I now recognize that it was an impossible task to require myself to perform under the world's spotlight in surroundings where I did not have even a person to confide in. Being completely cut off from the outside world, except for the glare of cameras, I felt stranded, isolated and hated.

4. I am not attending college at this time. Instead, I am using this time to reflect and determine my future. I am also beginning counseling to help me deal with stress and eliminate the effects stress has had on my life.

5. While I do not know where the future leads me, I still fundamentally believe in the justice of my case. I also believe that had other women been with me, the outcome might have been different. I often think about how different it would be with other women to share the burdens and challenges of being the "first".

6. I understand that there are other women who have inquired into admission to The Citadel, and others, such as Nancy Mellette, who are already determined to attend. I understand that other Citadel students have withdrawn from the Citadel and been re-admitted upon application. If other women were present at the Citadel, I would definitely consider re-applying to finish my degree at The Citadel. I attended day-classes at The Citadel for approximately a year and a half. All of my credits have been accepted by transfer by The Citadel or originated at The Citadel. I am classified as an incoming Junior. I do have a concern about my credits fully transferring in another college since I am in upper-level courses now. Additionally, I still respect The Citadel as a school and still think about wearing "The Ring". However, I do not want to be alone again.

7. When I entered The Citadel, I truly did not fathom the burden I put on myself by being the only one. I do not think anyone could truly foresee the awful feeling this was.

8. I do not believe the gates of The Citadel should be shut on me for trying to accomplish the impossible. The Citadel re-admits male cadets who leave under much different reasons. I have not foreclosed the option of requesting re-admission from The Citadel; However, I would not go in alone again.

9. I filed this action as a class action. My interests have not changed at all since the day I filed this action. I fought for the right to be treated equally. I still desire this right, including the right to be re-admitted with other women. I request this Court deny The Citadel's motion to dismiss me as a Plaintiff. I still stand ready to serve as a class representative, as I requested years ago, and still am detrimentally affected by The Citadel's state-sanctioned policy of treating me different from males.

/s/ Shannon Richey Faulkner
Shannon Richey Faulkner

Date: 12 Sept 95

SWORN TO BEFORE ME THIS
12 day of September, 1995.
/s/ Suzanne E. Coe
Notary Public for South Carolina
My Commission Expires: 5/6/2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

SHANNON RICHEY FAULKNER, individually and on behalf of all others similarly situated, Plaintiff-Intervenor, v. and the UNITED STATES of AMERICA, Plaintiff-Intervenor, v. JAMES E. JONES, Jr., et. al. Defendants, and the STATE OF SOUTH CAROLINA, et. al., Additional Defendants.	CASE NO. 2:93-0488-2 AFFIDAVIT OF ALBERT EDWARD FAULKNER, JR.

PERSONALLY APPEARED BEFORE ME, ALBERT EDWARD FAULKNER, JR., being duly sworn, and states:

1. I am the father of Shannon Richey Faulkner, the Plaintiff in this action;

2. I went to Charleston on August 18, 1995, due to a call we received from Shannon about her stomach and her desire to return home;

3. Along with Suzanne Coe and my son Todd, I went to The Citadel to check on Shannon;

4. When we arrived at the Infirmary, we went to Shannon's room. I have never, in the twenty years I have raised Shannon, seen her as emotional and irrational as that day. She was hysterical, said she could not take the pain of her stomach and stress anymore and wanted to come home. As a parent, I have never felt so powerless in my life. I know that Shannon truly did want to attend The Citadel and graduate. I also know that on August 18, 1995, my heart broke when I saw how difficult and lonely this was for her. Throughout this, General Poole kept coming in and asking "What are you going to do", to us all. We would respond that we were talking and needed time. Shannon asked him, in my presence, if she could have a medical leave to consult another doctor about the pain in her stomach and stress. General Poole told her this was not possible. When we had been in the room about 45 minutes with Shannon, General Poole pulled me aside and told me Shannon had 15 minutes to make a "final" decision to stay or go. He told me that if she was not in "formation" in 15 minutes, she would have to withdraw. At this point, Shannon was so upset that I was powerless to do anything about it. During the approximate 45 minute session we had with Shannon, we tried to get her other counsel on the phone and let her know how everyone was behind her. When the nurse (Beth Summerford, who testified against Shannon before this Court) learned that we were using the phone, she sent someone in to take it out of the wall to further cut Shannon off. I was in disbelief at the pettiness.

When our 15 minutes were up, Shannon was still hysterical. There was no way she could be in formation. General Poole came in the room, and asked for either an

immediate decision or for Shannon to go to formation immediately. That was when Shannon told them she desired to withdraw.

5. During this entire process, a massive press entourage was gathered outside the infirmary, in Shannon's direct view. She would look out the window and cry, holding her stomach.

6. While in with Shannon, I saw what kind of stress she really was under. I have never actually "felt" loneliness coming from someone like I did in her infirmary room. It is a feeling I never hope to feel again.

7. I have no doubt that Shannon left The Citadel under extreme stress. We have now engaged counseling services to help her deal with her feelings regarding the litigation. The family is helping Shannon determine her future. Everyday, her feelings about her future are brighter. She has repeatedly told us that it would have been different if she had not been alone. Shannon has stated repeatedly to me and other family members that if other women were present, she would consider finishing her education at The Citadel.

As always, we support Shannon and any plans for her future. Should she decide to apply for re-admission to The Citadel, we would support her decision. However, we would require that this time she not be alone.

/s/ Albert E. Faulkner, Jr.
ALBERT EDWARD FAULKNER, JR.

SWORN TO BEFORE ME
THIS 12 day of September, 1995.

/s/ Suzanne E. Coe
Notary Public for South Carolina
My Commission Expires: 5/6/2002

No. 95-31

Supreme Court, U.S.
FILED
SEP 21 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1995

SHANNON RICHEY FAULKNER,
individually and on behalf of all others similarly situated,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent,

—and—

JAMES E. JONES, JR., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF SHANNON RICHEY FAULKNER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

VALORIE K. VOJDIK
Counsel of Record
New York University
School of Law
137 MacDougal Street
New York, New York 10012
(212) 998-6550

ROBERT R. BLACK
23 Broad Street
P.O. Box 643
Charleston, South Carolina 29402
(803) 577-5806

HENRY WEISBURG
THOMAS F. SWIFT
MARY K. WARREN
VANESSA BEEVER
SHEARMAN & STERLING
153 East 53rd Street
New York, New York 10022
(212) 848-4000

SUZANNE E. COE
ARNOLD & COE
408 North Church Street,
Suite C
Greenville, South Carolina 29601
(803) 235-4505

TABLE OF AUTHORITIES

CASES	Page(s)
Brown v. Board of Educ., 347 U.S. 483 (1954)	2, 6, 7
Estelle v. Gamble, 429 U.S. 97 (1976)	5
Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995)	3, 4, 6, 8
J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994)	1, 7, 8
Land v. Dollar, 330 U.S. 731 (1947)	5
Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)	7, 8
Sweatt v. Painter, 339 U.S. 629 (1950)	2, 7
United States v. Commonwealth of Virginia, 44 F.3d 1229 (4th Cir. 1995)	1, 2

Neither South Carolina or The Citadel respondents ("South Carolina respondents") nor the United States offer any reason that eliminates the need for this Court to review and reverse the decision below.

1. Neither the United States nor the South Carolina respondents address the specific grounds for certiorari presented by Ms. Faulkner. Instead, both erroneously assert that Ms. Faulkner's petition "seeks review of the same remedial issue" raised by the United States in its petition for writ of certiorari in *United States v. Commonwealth of Virginia*, 44 F.3d 1229 (4th Cir. 1995) ("*VMI II*"). Citadel Brief In Opposition at 6 ("Citadel Opposition"). While the United States admits that the decision below "presents an issue of importance calling for this Court's review," Memorandum for the United States In Opposition at 6 ("U.S. Memorandum"), it argues that any decision in *VMI II* will resolve the issue presented in *Faulkner*. The South Carolina respondents merely rely upon the Brief in Opposition to the Petition for Certiorari in *VMI*, which does not address the arguments raised by Ms. Faulkner. Seeking to conflate the two cases, respondents ignore fundamental differences between the legal arguments presented in each petition and the different records in each case.

a. Respondents do not dispute that Shannon Faulkner's petition raises the exceptionally important issue explicitly reserved by this Court most recently in *J.E.B. v. Alabama ex rel. T.B.*, 114 U.S. 1419 (1993), as to the proper level of scrutiny that applies to a state's remedial choice to preserve an unconstitutional gender classification. Neither The Citadel respondents nor the United States even addressed this issue. Whether a state's decision to perpetuate the invidious exclusion of women from a unique military-style college by relegating women to a separate and unequal program is inherently suspect, raises an exceedingly important issue that warrants immediate review by this Court.

b. The legal arguments presented by Ms. Faulkner and the United States differ in nature and scope. Unlike the United States, Ms. Faulkner broadly attacks the decision below on strictly legal grounds. Ms. Faulkner argues that a state's remedial decision to perpetuate its unconstitutional exclusion of women is inherently suspect, and subject to strict scrutiny by the court.[1] The United States does not raise this issue. Ms. Faulkner also argues that, under *Brown v. Board of Educ.*, 347 U.S. 483, 488 (1954), women are entitled to educational opportunities "equal" to those offered to men by a state, not "substantively comparable" as the decision below authorizes. Unlike the United States, Ms. Faulkner argues that, under *Brown* and *Sweatt v. Painter*, 339 U.S. 629 (1950), the only appropriate remedy "[o]nce a federal court finds that a state has unlawfully excluded a group of students from a public educational program . . . is for the state to admit the excluded individuals and to remedy the prior discrimination." Faulkner Petition at 19. Finally, Ms. Faulkner does not concede that the question presented in *Faulkner* or *VMI* relates to the maintenance of "single-sex education." The exclusion of women from the Citadel denies women equal access to power, prestige, and career opportunities—not to "single-sex education."

In contrast, the question presented by the United States is narrowly tailored and primarily fact-bound. The United States does not categorically challenge the holding of *VMI II* that permits a state to remedy the unconstitutional exclusion of women from a unique state college by creating a separate and unequal program for women. The United States instead concedes that "assum[ing] that state maintenance of separate single-sex schools for men and women . . . [a state] must provide educational programs that are genuinely equal or the State must justify any inequality under a standard of

---

[1] Neither VMI nor The Citadel contends that their males-only admission policy meets the test of strict scrutiny.

heightened constitutional scrutiny." United States' Petition at 16. ("U.S. Petition") The United States does not argue that a state may never provide unequal educational programs, only that "*in the circumstances of this case*, the only remedy consistent with equal protection principles is to admit women to VMI." U.S. Petition at 26 (emphasis added). In its brief in opposition, the United States likewise focuses solely on the facts of this case, arguing that under the circumstances of *Faulkner*, a separate program for women cannot remedy the violation of equal protection.

By narrowly tailoring their argument to the facts and circumstances of *VMI*, the United States makes an essentially fact-bound challenge that fails to offer any standard for this Court as to when separate and manifestly unequal programs may be appropriate. Ms. Faulkner's petition offers this Court the opportunity to consider highly important, and unresolved, issues as to the appropriate level of scrutiny applicable to gender classifications, and a state's obligation to provide all of its citizens with equal educational opportunities. It is the more appropriate vehicle for review by this Court.

c. Respondents attempt to gloss over the obvious factual differences between the record in *Faulkner* and in *VMI*. In opposing Ms. Faulkner's petition, the United States argues that the differences in the factual records of the cases are not relevant "because the district court in this case provisionally accepted the findings in *VMI* on that issue." U.S. Memorandum at 7-8 n.5. That misses the point. The rule of law adopted by the Fourth Circuit in *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) ("*Faulkner II*"), purports to exclude women from The Citadel based upon factual findings made in *VMI* about the alleged value of single-sex education and the effect of coeducation on VMI, which the United States did not appeal. The reach of its holding is broad indeed, and consideration of its effect on different factual situations, such as that presented in *Faulkner*, is essential to fully evaluate the Fourth Circuit's holding.

2. The United States suggests that this petition "would appear to be premature" because the district court has not had an opportunity to make factual findings on the constitutionality of South Carolina's remedial proposal for a non-military program for women at Converse College. U.S. Memorandum at 7. The United States does not dispute that the legal principles challenged by Ms. Faulkner in her petition will, absent review by this Court, govern the remedial proceedings below. U.S. Memorandum at 4, 6-7.[2] Nor does the United States deny that certiorari is appropriate where, as here, the court of appeals has adopted an unconstitutional standard of law that will govern future proceedings in an action. *See* Faulkner Petition at 9-10. It nevertheless suggests that (1) the courts below might find that the Converse Plan fails to meet the "special equal protection" test adopted in the decision below, and (2) this Court "will have the opportunity to review and decide the central issues in [*Faulkner II*]" because the United States' petition in *VMI* raises "the same issues." *Id.* Rather than militate against review by this Court, these arguments demonstrate the need for immediate review by this Court.

a. The United States concedes that the constitutionality of the Converse proposal, which South Carolina asserts is "modeled closely on the Mary Baldwin Plan," (Citadel's Application For Stay to the U.S. Supreme Court at 7) will be analyzed under the "toothless 'substantive comparability' requirement" set forth in the decision below. United States Reply In *VMI* at 9 ("U.S. Reply") The United States admits that the "special equal protection test" adopted below "requires no heightened justification," (U.S. Petition at 16) and "compounds the original constitutional violation by invoking harmful gender stereotypes." *Id.* at 15.

---

[2] Contrary to the United States suggestion, Ms. Faulkner's claim is not moot. She withdrew from the Corps of Cadets under great mental stress, and will consider applying for re-admission if the courts permit other women to attend. In addition, Nancy Mellette filed a motion to intervene in this petition on September 11, 1995.

Absent review by this Court, the courts below will review the Converse proposal under the blatantly unconstitutional legal principles announced in the decision below: (1) that a state may remedy an unconstitutional gender classification by creating a separate, and intentionally unequal, program for women, based upon differences in the "educational needs of most men and women"; (2) that a state need not offer women "identical" educational programs, only programs for women which are "substantially comparable" to those provided to men; and (3) that such a remedy satisfies the requirements of equal protection as long as it meets the "special equal protection test" adopted by the Fourth Circuit in the decision below. In similar situations in the past, this court has exercised its jurisdiction to determine an important issue of law which is fundamental to the further conduct of the case. *See, e.g., Estelle v. Gamble*, 429 U.S. 97 (1976); *Land v. Dollar*, 330 U.S. 731 (1947). That course makes special sense here given the pendency of a petition for certiorari in the *VMI* case. Faulkner Petition at 12.

To require the parties to litigate the Converse proposal under an unconstitutional standard is not just an exercise in futility, it is fundamentally unjust. Had the court of appeals remanded a race discrimination case for consideration under the rational basis test, it is doubtful that the United States would argue that review by this Court would be premature.

To avoid unnecessary delay and duplication of judicial resources in this case, this Court should consider all of the issues raised in both cases at once, as it did when considering similar issues of state-sponsored education in *Brown*. Ms. Faulkner has a right to seek immediate review of the manifestly unconstitutional test adopted by the Fourth Circuit, which otherwise will govern the remedial proceedings below. Absent review by this Court, the record and review of the Converse proposal will be infected, perhaps irremediably, by the mandate of the decision below.

b. No further factual findings by the district court are required in *Faulkner* to reverse the decision below, which fundamentally conflicts with well-established principles of equal protection and gender discrimination announced by this Court. The issue presented in Ms. Faulkner's petition, unlike the United States in *VMI*, does not turn on the factual findings of the courts below as to the adequacy of a "separate and unequal" program for women. Ms. Faulkner challenges the legal standard adopted by the Fourth Circuit in *Faulkner II* which authorizes "separate and unequal" education for women, and which modifies the well-established equal protection analysis employed by this Court to evaluate gender classifications. These are questions of law that require no further factual findings by the courts below.

The United States, in fact, concedes that no further factual findings are necessary to resolve the question presented. In its reply in support of its petition in *VMI*, the United States argues that the adverse factual findings in *VMI* "presents no impediment to this Court's review of the question presented by [The United States]" because "the court of appeals' decision approving the remedy in [*VMI*] is squarely in conflict with this Court's equal protection cases even assuming the complete correctness of the district court's factual findings." U.S. Reply at 3. If the adverse factual findings in *VMI* are irrelevant to the question presented in *VMI*, they are equally irrelevant to the question presented by Ms. Faulkner in her petition.

c. As discussed above, Ms. Faulkner's petition raises substantially different issues than the United States' petition in *VMI*. *See infra at 2-4*. Because the United States' petition is primarily fact-bound and limited to "the circumstances of [*VMI*]," a decision in that case might not necessarily dispose of the remedial issues raised in *Faulkner*. Further, there is absolutely no guarantee that this Court will grant the United States' petition for certiorari in *VMI*, or that it will render a decision by next spring, if it does grant the petition.

3. In Virginia's brief in opposition to certiorari in *VMI*, Virginia erroneously asserts that (1) *Sweatt v. Painter* applies only to racial classifications, not to gender classifications, and (2) the United States cannot rely on *Sweatt* because it concedes that a state may justify any inequality in single-sex programs under heightened scrutiny. Brief for Virginia in Opposition at 20-21. ("Virginia Opposition"). *Sweatt* was decided prior to *Brown v. Board of Educ.*, 347 U.S. 483 (1954), before racial classifications were inherently suspect. It did not turn on the nature of the classification or level of scrutiny, but upon the nature of the right to equal protection. Contrary to South Carolina's suggestion, *Sweatt* was decided at a time when the law reflected a belief that separation of the races *was* beneficial and constitutional.

Unlike the United States, Shannon Faulkner does not admit that a state may remedy the exclusion of women from a unique public college, which the federal courts have found is unconstitutional, by creating a separate and intentionally unequal program for women. Women are entitled to no less protection than that afforded racial minorities under the discredited doctrine permitting "separate but equal" facilities.

4. The South Carolina respondents argue that the decision below does not conflict with *J.E.B.* or *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), because the district court in *VMI* found as a fact that there are "psychological and sociological differences" between men and women that are "real differences, not stereotypes." Virginia Opposition at 22. South Carolina fundamentally misapprehends the meaning of "stereotype" and "overly broad generalizations" prohibited by this Court, *inter alia*, in *Hogan* and *J.E.B.*

The South Carolina respondents erroneously assert that the decision below stating that "most women" are not suited for this type of education is not a stereotype, even though the decision below states that "some women" could perform and succeed at The Citadel. As this Court held in *J.E.B.*, sex cannot be a proxy for individual characteristics. *J.E.B.*, 114 S. Ct.

at 1427. In this case, the decision below improperly attributes to all women the "educational needs" of "most" women. Although The Citadel and South Carolina conceded at trial that women can meet the requirements of the Corps of Cadets, the Fourth Circuit nevertheless refused to require the admission of women based upon "established differences in the educational needs of the two genders." *Faulkner II*, 51 F.3d at 443. This is precisely the stereotypical thinking and overly broad generalization rejected outright by this Court in *J.E.B.*, *Hogan*, and a host of other decisions prohibiting classifications based upon gender.

* * * * *

For all of the reasons stated in the petition, and all of the reasons stated herein, the petition for a writ certiorari should be granted.

Dated: New York, New York
September 21, 1995

Respectfully submitted,

Henry Weisburg
Thomas F. Swift
Mary K. Warren
Vanessa Beever
SHEARMAN & STERLING
Citicorp Center
153 East 53rd Street
New York, NY 10022
(212) 848-4000

Suzanne E. Coe
ARNOLD & COE
408 North Church Street,
Suite C
Greenville, SC 29601
(803) 235-4505

Valorie K. Vojdik
Counsel of Record
New York University
School of Law
137 MacDougal Street
New York, NY 10012
(212) 998-6550

Robert R. Black
23 Broad Street
P.O. Box 643
Charleston, SC 29402
(803) 577-5806

(6) (4)

Nos. 95-31, 95-258

Supreme Court, U.S.
FILED
SEP 25 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

SHANNON RICHEY FAULKNER,

Petitioner/Respondent,

and the

UNITED STATES OF AMERICA,

Respondent,

v.

JAMES E. JONES, JR., *et al.*,

Respondents/Petitioners.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MEMORANDUM IN OPPOSITION TO MOTION OF NANCY MELLETTE TO ADD PARTY OR TO INTERVENE

M. Dawes Cooke, Jr.
Barnwell, Whaley, Patterson & Helms
134 Meeting Street
Charleston, South Carolina 29402
(803) 577-7700

Robert H. Hood
Hood Law Firm
172 Meeting Street
P. O. Box 1508
Charleston, South Carolina 29402
(803) 577-4435

**Counsel of Record*

Charles J. Cooper*
Michael A. Carvin
Vincent J. Colatriano
David H. Thompson
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Charles Molony Condon
Attorney General for the State of South Carolina
Treva G. Ashworth
Kenneth P. Woodington
Cameron B. Littlejohn, Jr.
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-3970

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1 4 PP

TABLE OF CONTENTS

Page

STATEMENT 1

ARGUMENT 2

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Aeronautical Radio, Inc. v. FCC, 983 F.2d 275 (D.C. Cir. 1993) 3

Banks v. Chicago Grain Trimmers Ass'n, 389 U.S. 813 (1967), 390 U.S. 459 (1968) 8

Bryant v. Yellen, 447 U.S. 352 (1980) 8

Federal Election Comm'n v. NRA Political Victory Fund, ___ U.S. ___, 115 S. Ct. 537 (1994) 5

Fox v. Board of Trustees of the State Univ. of New York, 148 F.R.D. 474 (N.D.N.Y. 1993), *aff'd*, 42 F.3d 135 (2d Cir. 1994) 4

Fuller v. Volk, 351 F.2d 323 (3d Cir. 1965) 4

Hoots v. Pennsylvania, 672 F.2d 1133 (3d Cir. 1982) 9

Hunter v. Ohio ex rel. Miller, 396 U.S. 879 (1969) 8

League of United Latin Am. Citizens, Council No. 4434 v. Clements, 884 F.2d 185 (5th Cir. 1989) 6, 9

Mullaney v. Anderson, 342 U.S. 415 (1952) 3

New Jersey v. New York, 345 U.S. 369 (1953) 9

Rogers v. Paul, 382 U.S. 198 (1965) 3

Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961) 6

Simmons v. ICC, 716 F.2d 40 (D.C. Cir. 1983) 4

United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) 5

United States v. City of Philadelphia, 798 F.2d 81 (3d Cir. 1986) 6, 8

TABLE OF AUTHORITIES – Continued

Page

United States v. South Bend Community School Corp., 710 F.2d 394 (7th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984) 6

United States ex rel. Texas Portland Cement Co. v. McCord, 233 U.S. 157 (1914) 3

Virginia v. Westinghouse Elec. Corp., 542 F.2d 214 (4th Cir. 1976) 7

RULES

Fed. R. Civ. P. 21 4

Fed. R. Civ. P. 24(a)(2) 6

OTHER

7 Wright, Miller and Kane, *Federal Practice and Procedure: Civil* § 1686 4

7C Wright, Miller and Kane, *Federal Practice and Procedure: Civil* § 1909 6

MEMORANDUM IN OPPOSITION TO MOTION OF NANCY MELLETTE TO ADD PARTY OR TO INTERVENE

James E. Jones, Jr., The Citadel, the Military College of South Carolina ("The Citadel"), and the State of South Carolina, *et al.*, respondents in No. 95-31 and petitioners in No. 95-258, respectfully submit this memorandum in opposition to the Motion of Nancy Mellette ("Mellette") to Add Party or to Intervene ("Motion"). (The Citadel and South Carolina are both respondents and petitioners before this Court, so we will refer to them herein collectively as "defendants.") Because the Motion is a transparent – and untimely – attempt on the part of the lawyers for Shannon Richey Faulkner ("Faulkner"), petitioner in No. 95-31 and respondent in No. 95-258, to resuscitate Faulkner's moot petition for writ of certiorari, and because the Motion does not in any event meet the standards for the addition or intervention of parties before this Court, the extraordinary relief sought by the Motion must be denied.

STATEMENT

On July 10, 1995, Faulkner filed her petition for certiorari in No. 95-31, seeking review of the "remedial aspect" of the Fourth Circuit's decision in *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) (*"Faulkner II"*). Motion at 3. Defendants, who had sought and received an extension of the time within which to file a petition for writ of certiorari, timely filed their petition in No. 95-258 on August 11, 1995. Pursuant to the Fourth Circuit's decision in *Faulkner II*, Faulkner entered The Citadel on August 12, 1995. On August 18, 1995, however, Faulkner voluntarily withdrew from The Citadel. On September 11, 1995, Faulkner's lawyers filed the instant Motion on behalf of Mellette.

ARGUMENT

In a last-ditch effort to preserve their involvement in this case, Faulkner's lawyers seek to insert into these proceedings – two and a half years after this action was initiated *and at the Supreme Court level* – an entirely new person who will supposedly just pick up Faulkner's mooted petition and proceed with Faulkner's case as if nothing had ever happened. They admit that this remarkable request is prompted by their fear that Faulkner's claims have become moot. Acknowledging that Faulkner "has withdrawn from the Corps of Cadets and is not currently pursuing a Citadel education," Faulkner's lawyers concede "the potential argument that her claims are moot." Motion at 5. *See also id.* at 17a. Faulkner's claims, however, are not "potentially" moot; they are moot beyond a doubt, as demonstrated in our Memorandum Suggesting Mootness of Petition for Writ of Certiorari of Shannon Richey Faulkner, filed September 19, 1995. The United States recognizes this obvious and inescapable conclusion. *See* Brief for the United States in Opposition, at 7 n.4, *Jones v. Faulkner* (No. 95-258).

Mellette's access to this Court is foreclosed for three reasons. First, she seeks by her Motion to be added or to intervene not as a party to this *case*, but as a party to a certiorari *petition* that no longer exists, as a matter of law. When Faulkner voluntarily withdrew from The Citadel, she mooted her petition, and neither Mellette nor this Court can now raise it from the dead. Second, even if Mellette satisfied the requirements under the Federal Rules of Civil Procedure for addition to or intervention in this *case*, she would have to file her own petition for writ of certiorari, which would now be jurisdictionally out of time. Finally, because Mellette's interests in this case are adequately protected by the United States, she does not satisfy the most basic requirement for injecting herself into these proceedings, either as a petitioner or as a respondent.

1. Mellette does not seek in her Motion to be added or to intervene as a party *to this case*. Rather, she "seeks to be added or to intervene as a party to *the two Petitions* presently before the Court." Motion at 4 (emphasis added). This Court, however, no longer has jurisdiction over Faulkner's petition in No. 95-31 since that petition is now moot. Put simply, when Faulkner voluntarily withdrew from The Citadel, there was no longer any live petition before this Court to which Mellette could be added or in which Mellette could intervene as a petitioner.

In none of the cases cited in the Motion has this Court allowed an entirely new person to be added or to intervene as a party to a certiorari petition *after* the original petition had been rendered moot. In *Rogers v. Paul*, 382 U.S. 198 (1965), the case on which Mellette principally relies, new petitioners were added by this Court while the original petition was still live and justiciable; at least one of the original named plaintiffs was still in high school at the time, and his petition for review of a desegregation decision in a class action case thus had not been rendered moot. Nor is Mellette's request supported by *Mullaney v. Anderson*, 342 U.S. 415 (1952). In that case, additional parties were added as *respondents*, not as petitioners. Accordingly, there was no issue in *Mullaney* concerning the ability of a prospective party to rejuvenate a moot certiorari petition.

Not surprisingly, the few cases that are relevant to Mellette's motion foreclose her extraordinary request. The addition or intervention of a party presupposes the pendency of a *live* petition. *See, e.g., United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 163-64 (1914) ("These rights to intervene and to file a claim, conferred by the statute, presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. The intervention could not cure this vice in the original suit."). *See also Aeronautical Radio, Inc. v. FCC*, 983 F.2d 275, 283 (D.C. Cir. 1993) (dismissing

prospective intervenor who lacked independent jurisdictional basis for challenge to rule where the court lacked jurisdiction over the proceeding in which intervention was sought); *Simmons v. ICC*, 716 F.2d 40, 46 (D.C. Cir. 1983) (dismissing intervenor when original petitioner lacked jurisdictional basis for petition and intervenor did not file intervention request within 60-day time limit for filing petition for review); *Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir. 1965) ("It is well-settled that since intervention contemplates an existing suit in a court of competent jurisdiction and because intervention is ancillary to the main cause of action, intervention will not be permitted to breathe life into a 'nonexistent' lawsuit.").[1] Because this Court has no jurisdiction over Faulkner's moot petition, Mellette's Motion must be denied

2. In addition to her request to be added or to intervene as a party to the certiorari petitions before this Court, Mellette has also moved in the district court "to intervene as a plaintiff and to be designated as a class representative" in this case. Motion at 4. But even if she could satisfy the requirements for intervention as a party plaintiff to this case, any effort by her to seek this Court's review of the court of appeals' decision in *Faulkner II* is

---

[1] The same result obtains with respect to a request, under Rule 21 of the Federal Rules of Civil Procedure, to add a new petitioner. Rule 21 "contemplates the retention of one or more parties in the action and is not a method for substituting the sole plaintiff or defendant in the case with another party." 7 Wright, Miller and Kane, *Federal Practice and Procedure: Civil* § 1686 at 463. Thus, Rule 21 was not intended " to deal with problems of defective federal jurisdiction." *Fox v. Board of Trustees of the State Univ. of New York*, 148 F.R.D. 474, 484 (N.D.N.Y. 1993), *aff'd*, 42 F.3d 135 (2d Cir. 1994) (quoting *Field v. Volkswagenwerk AG*, 626 F.2d 293, 306 (3d Cir. 1980) (quoting *Kerr v. Compagnie De Ultramar*, 250 F.2d 860, 864 (2d Cir. 1958))). In short, "Rule 21 cannot be employed as a means to create a case or controversy through substitution where one no longer exists." *Fox*, 148 F.R.D. at 486.

now jurisdictionally out of time. Faulkner filed her petition on July 10, 1995, two days before the expiration of the 90-day time period within which a petition could be filed. The instant motion was filed over sixty days after the deadline for the filing of a petition for writ of certiorari had passed.

Just last term this Court reaffirmed the nonwaivable jurisdictional nature of the 90-day limit for filing certiorari petitions in civil cases and rejected an untimely effort to breathe life into a jurisdictionally defective petition. In *Federal Election Commission v. NRA Political Victory Fund*, ___ U.S. ___, 115 S. Ct. 537 (1994), the Federal Election Commission ("FEC") timely filed a certiorari petition, although it lacked at the time the statutorily required authorization of the Solicitor General. The Solicitor General attempted to "cure" this defect in the FEC's certiorari petition by retroactively authorizing the FEC's action. Because the Solicitor General's authorization, however, came well after the deadline for filing a petition had passed, this Court held that the authorization "simply came too late in the day to be effective" and dismissed the petition for want of jurisdiction. *Id.* at 543. The decision in the *NRA Political Victory Fund* case is fully applicable here. For even if Mellette's Motion could somehow be construed as a certiorari petition, it simply comes "too late in the day to be effective." *Id.* at 543.[2]

3. In any event, Mellette's attempt to revive Faulkner's moot petition, and to be added or to intervene as a respondent with respect to defendants' petition, fails to

---

[2] *See also United Airlines, Inc. v. McDonald*, 432 U.S. 385, 392, 395 n.16 (1977) (affirming decision that district court should have granted motion for leave to intervene for purposes of appealing decision denying class certification; motion was timely in part because it "complied with, as it was required to, the time limitation for lodging an appeal prescribed by Fed. R. App. Proc. 4(a).").

meet the requirements of the Federal Rules of Civil Procedure. Rule 24(a)(2) prohibits intervention of right if the prospective intervenor's "interest is adequately represented by existing parties." In this case, the United States argued in its own intervention motion in the district court that it "seeks the full vindication of the rights of women to equal educational opportunity at The Citadel." Brief of United States in Support of Its Motion to Intervene at 3.[3]

When the United States represents the interests of persons seeking to intervene, the representation of the United States is presumed to be adequate. *See* 7C Wright, Miller and Kane, *Federal Practice and Procedure: Civil* § 1909 at 342. *See, e.g., United States v. City of Philadelphia*, 798 F.2d 81, 90 (3d Cir. 1986). Thus, in *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961), the Court rejected a motion to intervene filed by parties who charged that the United States did not adequately represent their interests in negotiations relating to an antitrust decree. The Court noted, without deciding, that intervention was not appropriate "in the absence of any claim of bad faith or malfeasance on the part of the Government . . . " 366 U.S. at 689. *See also United States v. South Bend Community School Corp.*, 710 F.2d 394 (7th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984). It is similarly well-established that a prospective intervenor who has the same ultimate objective or who seeks the same ultimate relief as an existing party must make a very compelling showing that the party's representation is inadequate. *See League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989); *South Bend*, 710 F.2d at 396;

---

[3] At a hearing held in the district court, the court inquired whether the Department of Justice had "intervened as a Plaintiff intervenor for all other women." Ms. Beber, a Justice Department attorney, responded, "Yes, Sir." Hearing Transcript at 183 (Aug. 10, 1994).

Virginia v. Westinghouse Elec. Corp., 542 F.2d 214, 216 (4th Cir. 1976). Thus, in cases in which a party seeks relief identical to that sought by the prospective intervenor, or in which the United States represents the interests of the prospective intervenor, intervention should be denied in the absence of a clear demonstration of bad faith or of "adversity of interest, collusion, or nonfeasance." *Westinghouse*, 542 F.2d at 216.

Mellette has utterly failed to rebut the presumption of the adequacy of the United States' representation of her interests. Far from showing that the United States has an interest adverse to her own or that it has acted incompetently, collusively, or in bad faith in this case, her only argument is that "the United States cannot represent the interests of individual plaintiffs such as Ms. Mellette before the Court, since the United States has not sought review of the Fourth Circuit's decision." Motion at 3 n.2; *see also id.* at 7 n.4. As an initial matter, this argument says *nothing* about the adequacy of the United States' representation of Mellette's interests as a *respondent* with respect to defendants' certiorari petition in 95-258. And, as the briefs in opposition to defendants' petition reveal, the interests of the United States and Faulkner (and therefore Mellette) are identical. Both Faulkner's lawyers and the United States raised the same objections to defendants' petition and relied on virtually the same authority in support of their arguments.[4]

---

[4] In the district court, the United States has stated that it does not oppose Mellette's motion to intervene as a party plaintiff. Although the United States noted the "obvious overlap between the public interest of the United States in enforcing the Equal Protection Clause to the Constitution and the private interest of individual women," it nonetheless stated that "there is no identity of interest between the United States and individual citizens affected by this litigation." Response of the United States to Cross-Motion for Intervention and Renewal of Motion for Class Certification, dated September 8, 1995. The United

In any event, the fact that the United States has chosen not to seek, *at this time*, this Court's review of the Fourth Circuit's decision hardly demonstrates the inadequacy of the United States' representation of Mellette. Mere tactical differences between parties with common substantive interests generally will not warrant intervention. *See, e.g., United States v. Philadelphia, supra.* The United States has not *foregone* the opportunity to seek review of the remedial issues decided by the Fourth Circuit, but has merely argued that review of these issues is premature at this time. Memorandum for the United States in Opposition ("U.S. Mem.") at 7, *Faulkner v. Jones* (No. 95-31).[5] Indeed, the United States has made clear that it agrees that the issues raised in Faulkner's petition are worthy of this Court's review, and it has sought review of those same remedial issues in its pending petition for writ of certiorari in *United States v. Virginia*, No.

States offered no support for this statement, and the history of this litigation flatly contradicts it.

[5] In contrast, in *Bryant v. Yellen*, 447 U.S. 352 (1980), the Court allowed persons who had been represented by the United States to intervene where the Solicitor General had decided to forego an appeal of the district court's opinion. Similarly, in both *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969), and *Banks v. Chicago Grain Trimmers Association*, 389 U.S. 813 (1967), 390 U.S. 459 (1968), intervention was allowed where the parties who represented the prospective intervenors decided to completely forego requesting this Court's review of adverse decisions.

94-1941.[6] Moreover, the United States is currently vigorously contesting the constitutional adequacy of defendants' proposed remedy in the district court.[7]

Finally, as a general rule, where intervention as of right is denied because of adequate representation by a party seeking the same relief, permissive intervention is equally inappropriate. *See, e.g., Hoots v. Pennsylvania*, 672 F.2d 1133, 1136 (3d Cir. 1982); *League of United Latin Am. Citizens*, 884 F.2d at 189. *See also New Jersey v. New York*, 345 U.S. 369 (1953). To the extent, therefore, that Mellette seeks permissive intervention, her motion should be denied for the same reasons discussed above.

---

[6] *See* U.S. Mem. at 6 (Faulkner's certiorari petition "presents an issue of importance calling for this Court's review."); *id.* at 7 ("This Court will . . . have an opportunity to review and decide" the issues raised in Faulkner's petition, "because the same issues are presented in the United States' pending petition for a writ of certiorari in [*United States v. Virginia*], No. 94-1941.") (footnote omitted).

[7] For this reason, Mellette's claim that a denial of her motion will result in "needless and wasteful" litigation is meritless. Motion at 4, 5. If her motion is denied, there will be no need for her to relitigate the issues presented in this case; the United States will continue to represent her interest in gaining admission to The Citadel.

CONCLUSION

For the foregoing reasons, Mellette's Motion should be denied.

M. Dawes Cooke, Jr.
Barnwell, Whaley,
Patterson & Helms
134 Meeting Street
Charleston, South Carolina
29402
(803) 577-7700

Robert H. Hood
Hood Law Firm
172 Meeting Street
P. O. Box 1508
Charleston, South Carolina
29402
(803) 577-4435

*Counsel of Record

Charles J. Cooper*
Michael A. Carvin
Vincent J. Colatriano
David H. Thompson
Shaw, Pittman, Potts
& Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Charles Molony Condon
Attorney General for the
State of South Carolina
Treva G. Ashworth
Kenneth P. Woodington
Cameron B. Littlejohn, Jr.
P. O. Box 11549
Columbia, South Carolina
29211
(803) 734-3970

Dated September 25, 1995

Supreme Court, U.S.
FILED
OCT 2 1995
CLERK

No. 95-31
No. 95-258

In the

Supreme Court of the United States

October Term, 1995

SHANNON RICHEY FAULKNER, individually and on behalf of all others similarly situated,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

and

JAMES E. JONES, JR., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPPOSITION OF SHANNON RICHEY FAULKNER TO MEMORANDUM SUGGESTING MOOTNESS AND REPLY MEMORANDUM OF NANCY MELLETTE IN SUPPORT OF MOTION TO ADD PARTY OR INTERVENE

VALORIE K. VOJDIK
Counsel of Record
New York University
School of Law
137 MacDougal Street
New York, NY 10012
(212) 998-6550

ROBERT R. BLACK
23 Broad Street
P.O. Box 643
Charleston, SC 29402
(803) 577-5806

HENRY WEISBURG
THOMAS F. SWIFT
MARY K. WARREN
VANESSA BEEVER
Shearman & Sterling
153 East 53rd Street
New York, NY 10022
(212) 848-4000

SUZANNE E. COE
Arnold & Coe
408 North Church Street,
Suite C
Greenville, SC 29601
(803) 235-4505

TABLE OF AUTHORITIES

Page(s)

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. III, § 2 4
Fed. R. Civ. P. 21 6,7
Fed. R. Civ. P. 24 6,8,10
Sup. Ct. Rule 12 7

CASES

Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459 (1968) 6
Carroll v. Blinken, 768 F. Supp. 1030 (S.D.N.Y. 1991), *aff'd in part and rev'd in part on other grounds*, 957 F.2d 991 (2d Cir.), *cert. denied*, 113 S. Ct. 300 (1992) 4,5
DeFunis v. Odegaard, 416 U.S. 312 (1974) 2
Dimond v. District of Columbia, 792 F.2d 179 (D.C. Cir. 1986) 9
Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995) 2,5,6
Graves v. Walton County Bd. of Educ., 686 F.2d 1135 (1982) 8
Honig v. Doe, 484 U.S. 305 (1988) 5
Hunter v. Ohio ex rel. Miller, 396 U.S. 879 (1969) 6
In re Sierra Club, 945 F.2d 776 (4th Cir. 1991) 8
Kuntz v. Shawmut Bank, 488 U.S. 952 (1988) 7
Mills v. Green, 159 U.S. 651 (1895) 2
Mullaney v. Anderson, 342 U.S. 415 (1952) 8
Murphy v. Hunt, 455 U.S. 478 (1982) 1
National Farm Lines v. Interstate Commerce Comm'n, 564 F.2d 381 (10th Cir. 1977) 9
National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977) 7
Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) 2

Preiser v. Newkirk, 422 U.S. 395 (1975) 1
Rogers v. Paul, 382 U.S. 198 (1965) 9
Sagebrush Rebellion, Inc. v. Watt,
713 F.2d 525 (9th Cir. 1983) 3
Sanguine, Ltd. v. United States Dep't of Interior,
736 F.2d 1416 (10th Cir. 1984), *cert. denied*,
479 U.S. 1054 (1987) 9
Sosna v. Iowa, 419 U.S. 393 (1975) 3
Trbovich v. United Mine Workers of America,
404 U.S. 528 (1972) 8
United States Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 3,4

Neither the Memorandum Suggesting Mootness (the "Memorandum") filed by The Citadel and the State of South Carolina ("Respondents"), nor their Opposition to the Motion to Add Party or to Intervene (the "Motion") filed by Nancy Mellette, has any merit.

1. The issues raised by the Petitions are vital and justiciable. Respondents argue that Shannon Faulkner "voluntarily" withdrew from The Citadel and, therefore, no longer has any personal stake in the outcome of this litigation. Memorandum at 2, 6. Neither the facts nor the law supports such a rigidly formalistic interpretation of Article III jurisdiction.

a. Ms. Faulkner is entitled to reapply for admission to The Citadel and, therefore, retains a personal stake in the outcome of this litigation. Ms. Faulkner did not graduate from The Citadel, but withdrew under tremendous pressure and illness, which Respondents do not dispute. She is not attending any other college at this time and has expressed an interest in reapplying if other women are admitted. Respondents do not dispute that, like male cadets who withdraw for medical reasons, Ms. Faulkner is entitled to reapply for admission and resume her education at The Citadel. Under these circumstances, she continues to have a personal stake in the outcome of this litigation, which will determine whether women will be permitted to attend The Citadel.

Respondents have not cited a single case where a court has dismissed the claim of a student challenging an educational policy where the student is still eligible to receive the benefit. They deliberately ignore recent precedent reflecting the Court's pragmatic approach toward mootness analysis in the class action context, instead citing a string of older cases which were not brought as class actions or which are otherwise distinguishable from the facts and circumstances of this case.[1]

---

[1] Respondents rely primarily upon mootness decisions in cases involving a single plaintiff that, unlike this case, were not brought as class actions. *See, e.g., Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *Preiser v.*

(Footnote continues on following page)

Respondents also ignore that the legal battle continues unabated over the constitutionality of The Citadel's exclusion of women and its proposal to remedy that violation by segregating women in a separate and non-military program. In the five weeks since Shannon Faulkner withdrew, more than 50 women have written to The Citadel for applications and information about the Corps of Cadets; at least two women have submitted applications for admission, including Nancy Mellette. The district court has scheduled a trial for November 6, 1995 to review South Carolina's proposal for creating a separate and intentionally unequal, non-military program for women at Converse College. In addition, Respondents filed a petition for certiorari with this Court seeking review of the Court of Appeals' decision in *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) ("*Faulkner II*"), that The Citadel's discriminatory admissions policy violates the right of Ms. Faulkner, and all women, to equal protection. Ms. Faulkner filed a memorandum in opposition to Respondents' petition, and Respondents do not contend that she has no interest in opposing their petition.

Ms. Faulkner has not been dismissed from the action below, and the United States continues to prosecute its claim. Her interest in defending the decision that her right to equal

---

(Footnote continued from preceding page)

Newkirk, 422 U.S. 395, 402 (1975); *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974). Although the plaintiff in *Mills v. Green*, 159 U.S. 651, 653 (1895), had sued on behalf of other citizens for an injunction permitting him to vote in one election, the Court held the "matter in issue in the case" had been mooted after the election occurred. In the instant case, the *matter* is not mooted: the United States remains a party, and Nancy Mellette and other women seek admission. While *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 430 (1976), was originally filed as a class action, there is no indication that the plaintiffs ever attempted to certify the class or to substitute other plaintiffs after the original named plaintiffs graduated from high school. As in *Pasadena*, the presence of the United States in this case insures that the case is not moot. Unlike the high school students in *Pasadena*, who had graduated from high school, Ms. Faulkner is entitled to reapply and complete her college education at The Citadel.

protection has been violated continues, as well as her interest in preserving her right to choose to attend the public college of her choice. Moreover, the district court has scheduled a hearing on October 3, 1995 for Ms. Faulkner's class certification motion, which has been pending for over two years. If class certification is granted, there will no longer be any issue concerning the mootness of Ms. Faulkner's petition for certiorari. *See Sosna v. Iowa*, 419 U.S. 393 (1975); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980).

Ms. Faulkner's petition seeks review of the blatantly unconstitutional "special equal protection test" adopted by the Fourth Circuit. The substantial legal question that it presents directly will affect the rights of Nancy Mellette and over 50 other young women who now seek admission to The Citadel.

b. *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), controls the situation at hand. The plaintiff in *Geraghty* was a prisoner who filed a class action challenging the legality of federal parole release guidelines. *Id.* at 391-92. The district court denied class certification and then granted summary judgment for the defendants. *Id.* at 393. The plaintiff appealed both the denial of class certification and the final judgment, but before the case reached the Supreme Court, the plaintiff was released from prison, raising the potential argument that his claims were moot. *Id.* at 394-95. The defendants argued, as Respondents do here, that "where no class has been certified, there is no party before the Court with a live claim, and it follows . . . that [the Court has] no jurisdiction . . . ." *Id.* at 401. The Court disagreed, holding instead that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." *Id.* at 404.

The Court held that "mootness has two aspects: 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Id.* at 396 (citation omitted). The Court found that the controversy over the parole release guidelines was still a live dispute between the defendants "and at least some members of the class [the plain-

tiff] seeks to represent." *Id.* As evidence of the vitality of the controversy, the Court observed that prisoners currently affected by the guidelines had moved to intervene at the Supreme Court level. *Id.* In addition, the Court held that the prisoner plaintiff still had a personal stake in obtaining class certification. After a detailed discussion of "the flexible character of the Art. III mootness doctrine," *id.* at 400, the Court concluded that the named plaintiff had a personal stake in obtaining class certification and that the district court could determine whether he or another plaintiff would be an appropriate class representative on remand. *Id.* at 404-7.

The Court's reasoning, as well as its holding, is dispositive in the instant case, which mirrors *Geraghty*. The issues raised in Ms. Faulkner's petition for certiorari are clearly live for Nancy Mellette and the scores of other women who want to attend the military-style program at The Citadel. As in *Geraghty*, the motions of Nancy Mellette to intervene in the district court and this Court evidence the continued vitality of this dispute, as do the many inquiries and applications from women that have poured into The Citadel since Ms. Faulkner's withdrawal. Even were it determined that she had no other stake in this litigation, *Geraghty* illustrates that Ms. Faulkner has a personal stake in obtaining certification of a plaintiff class in the district court. Her interest is even more compelling than that of the *Geraghty* plaintiff, since her motion for class certification has not been denied, but rather has not yet been ruled on by the district court.

c. In addition, Ms. Faulkner's claim is not moot because it falls within the "capable of repetition, yet evading review" exception to the mootness doctrine. The Citadel continues to unlawfully exclude all women, including Nancy Mellette, from admission. Moreover, the possibility Ms. Faulkner may reapply for admission alone is sufficient to prove that The Citadel's discriminatory policy is "capable of repetition." In *Carroll v. Blinken*, 768 F. Supp. 1030, 1031 n.1 (S.D.N.Y. 1991), *aff'd in part and rev'd in part on other grounds*, 957 F.2d 991, 993 n.2 (2d Cir.), *cert. denied*, 113 S. Ct. 300 (1992), the Second Circuit cited with approval the refusal of the dis-

trict court to dismiss as moot the First Amendment claim of a college student who was dismissed from school for academic reasons after filing the action. *See also Honig v. Doe*, 484 U.S. 305, 318 (1988). Like Ms. Faulkner, the plaintiff had not applied for readmission, but the court nevertheless held that, under the school's policy, "he may choose to do so, and it is reasonable to expect that he would then again raise the same claim which was fully litigated in the trial before me." *Carroll*, 768 F. Supp. at 1031.

Contrary to Respondents' assertion, the duration of the challenged action is too short to permit the litigation of its constitutionality. The harm suffered by Ms. Faulkner and other women is the denial of their choice and ability to attend The Citadel. That harm does not automatically continue for four years, as Respondents suggest. Because The Citadel does not permit students to transfer into its program after the beginning of their junior year, Ms. Faulkner and other women at best have only two years in which to litigate their claims. This case, which has been expedited by the district court and the court of appeals, has already lasted over two and one-half years. The protracted length of this litigation proves beyond a doubt that an individual woman is unlikely to attain any affirmative relief in two years.

d. To declare Ms. Faulkner's petition moot would not serve the ends of justice or equity, but only assist The Citadel and South Carolina in insulating themselves from any meaningful review of the decision below. Respondents have filed a petition for certiorari, asking this Court to review the liability determination of *Faulkner II*. If neither Ms. Faulkner nor Ms. Mellette is permitted to challenge the remedial portion of *Faulkner II*, Respondents will likely argue that they are barred from raising that issue again. "[W]hile an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it." *Honig*, 484 U.S. at 331 (Rehnquist, J., concurring). This case surely presents such reasons.

2. Nancy Mellette is entitled to be added as a party to the petitions under Rule 21 or, alternatively, to intervene under Rule 24 of the Federal Rules of Civil Procedure. Respondents do not dispute that Nancy Mellette has a substantial interest in attending The Citadel that is likely to be determined by the outcome of this litigation. No other party in *Faulkner* or *VMI* is raising the same constitutional questions as those presented in Ms. Faulkner's petition, adopted by Ms. Mellette. If Ms. Mellette is forced to work her way up from the district court to raise the same issues now presented by Ms. Faulkner's petition, the courts, the parties and the taxpayers of South Carolina will be needlessly burdened by Respondents' litigation strategy. Joinder at this point in the litigation promotes judicial economy and saves expense for all parties.

a. Respondents assert that Ms. Mellette has not sought to intervene in this case and that she is not entitled to intervene in the two petitions because Ms. Faulkner's petition is moot. Respondents' argument is pure sophistry. First, Ms. Mellette has filed a motion to intervene in the underlying action in the district court, which is scheduled for argument on October 3, 1995. Second, Ms. Mellette is entitled to intervene to petition this Court for certiorari to review the decision below in *Faulkner II*, regardless of whether this Court dismisses Ms. Faulkner's petition on grounds of mootness. A new party is permitted to intervene in this Court under Fed. R. Civ. P. 24 regardless of whether an existing party has filed a petition for certiorari. This Court has granted leave to intervene to file a petition for certiorari to persons who were not parties in the courts below even where no petition is pending regarding the lower court ruling at issue. *See Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969) (petitioner, not party to proceedings below, permitted to intervene to file petition for certiorari even where party who had represented petitioner below declined to seek certiorari); *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968) (same). Nancy Mellette, like the petitioners in *Hunter* and *Banks*, has interests that will be vitally affected by this litigation. Even assuming

arguendo that Ms. Faulkner's claims are moot, Nancy Mellette is entitled to intervene independently for purposes of filing her own petition.[2]

b. Respondents incorrectly assert that Nancy Mellette is jurisdictionally barred from filing a petition for certiorari because her Motion was filed more than 90 days after the decision below was entered. Respondents are invoking the wrong deadline. Ms. Mellette's Motion, which adopts in full Ms. Faulkner's petition for certiorari, was filed on September 11, 1995, within 30 days after Respondents filed their petition for certiorari on August 11, 1995. Under Supreme Court Rule 12.3, Nancy Mellette's Motion qualifies as a cross-petition for certiorari.[3] By adopting the petition for certiorari filed by Ms. Faulkner, Ms. Mellette satisfied all of the requirements of Rule 12.3 governing a cross-petition's form and substance.

c. Respondents also assert that Ms. Mellette is not entitled to be added as a party to the petition under Fed. R. Civ. P. 21 because the Rule "contemplates the retention of one or more parties in the action" and should not be used to substitute the sole plaintiff in a case with another party. Because the United States remains a party to the *Faulkner* litigation, the addition of Ms. Faulkner would not create a case or controversy where none presently exists. Even assuming that Ms. Faulkner was the sole plaintiff in this action, courts have used Rule 21 to add additional parties to substitute for plain-

---

[2] The cases cited by Respondents are plainly inapplicable. Each involve attempts to intervene or add parties to actions that were jurisdictionally defective *when originally filed*. Ms. Faulkner indisputably had standing to commence this action and to file this petition.

[3] The Court has construed various pleadings liberally as petitions for certiorari when it wished to address the questions presented therein. *See, e.g.*, *Kuntz v. Shawmut Bank*, 488 U.S. 952 (1988) (petition for writ of mandamus treated as petition for certiorari); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977) (application for stay treated as petition for certiorari).

tiffs whose claims have become moot. *See, e.g., Graves v. Walton County Bd. of Educ.*, 686 F.2d 1135 (1982).

d. Respondents' attempts to distinguish *Rogers v. Paul*, 382 U.S. 198 (1965), and *Mullaney v. Anderson*, 342 U.S. 415 (1952), are unavailing. Respondents argue that *Rogers* is inapplicable because the petition was not moot since one of the original named plaintiffs was still in high school. Respondents neglect to mention that that plaintiff was in the middle of his last year of high school, which under Respondent's analysis would obviously render moot the plaintiff's interest in a desegregated high school system to be implemented in the future. *See Rogers*, 382 U.S. at 199. Respondents attempt to distinguish *Mullaney* on the ground that the parties added in that case were respondents, not petitioners. Aside from the fact that Nancy Mellette too seeks to be added as a respondent in the petition brought by The Citadel and South Carolina, *Mullaney* is applicable because the original respondents were the parties plaintiff who had instituted the lawsuit. *Mullaney*, 342 U.S. at 416-17. If they were deemed without standing, the Court acknowledged, the parties would have to start over in the district court unless addition of the new respondents was permitted. *Id.* The same rationale applies to the addition of Ms. Mellette.

e. Nancy Mellette's intervention is necessary under Fed. R. Civ. P. 24(a) and appropriate under Fed. R. Civ. P. 24(b). Contrary to Respondents' assertion, the United States is quite obviously not an adequate representative for Ms. Mellette's interests. The presence of the United States as a plaintiff does not preclude intervention.[4] Clearly the adverse positions taken by the United States and Ms. Faulkner on petition for certio-

---

[4] *See Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538-39 (1972) (concluding that "sufficient doubt about the adequacy of representation [existed] to warrant intervention" by a union member where the Secretary of Labor had two different, "related but not identical" duties: to serve union members and to protect the public interest); *In re Sierra Club*, 945 F.2d 776 (4th Cir. 1991) (denial of intervention re-

(Footnote continues on following page)

rari constitute an adversity of interest between the parties, even under the standard advocated by Respondents in the cases cited on pages 6-7 of their Opposition. The United States, recognizing that the interests of the United States and the individual plaintiffs have already diverged, supports Nancy Mellette's motion to intervene in the district court. A Department of Justice trial attorney described the United States' position during a hearing before the district court:

> We do enforce the law as we understand the law in light of what the priorities of the state are. But they are not necessarily the same interest [sic] as a private plaintiff or a private plaintiff class. So we generally work congenially with our fellow plaintiffs, but sometimes we make very different decisions.

September 23, 1994 Hearing Transcript ("Tr.") at 39-40. The Department of Justice attorney further described for the district court how political considerations, in civil rights cases as well as generally, can result in the United States' failing to take an appeal, or changing its view of the law in the middle of a case, or otherwise departing from the course followed by a private plaintiff. *See* September 23, 1994 Hearing Tr. at 35-48; February 17, 1994 Hearing Tr. at 28 *et seq.*

Finally, Respondents erroneously assert that the requirement of adequate representation applies to permissive inter-

---

(Footnote continued from preceding page)
versed on ground that state agency might not be adequate representative for citizen members of environmental group); *Dimond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986); *Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416 (10th Cir. 1984), *cert. denied*, 479 U.S. 1054 (1987) (denial of intervention reversed on ground that facts showed United States might not be adequate representative of private intervenors); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983) (denial of intervention reversed where facts showed United States might not adequately represent interests of private intervenors); *National Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381 (10th Cir. 1977).

vention as well as intervention of right. None of the cases cited by Respondents remotely supports this proposition. Their contention directly contradicts the language of Fed. R. Civ. P. 24(b)(2), which does not require any showing of inadequate representation.

*****

For the foregoing reasons, the Court should grant Ms. Mellette's Motion to Add Party or to Intervene and disregard Respondents' Memorandum Suggesting Mootness.

Dated: New York, New York
October 2, 1995

Respectfully submitted,

Henry Weisburg
Thomas F. Swift
Mary K. Warren
Vanessa Beever
SHEARMAN & STERLING
Citicorp Center
153 East 53rd Street
New York, NY 10022
(212) 848-4000

Suzanne E. Coe
ARNOLD & COE
408 North Church Street,
Suite C
Greenville, SC 29601
(803) 235-4505

Valorie K. Vojdik
Counsel of Record
New York University
School of Law
137 MacDougal Street
New York, NY 10012
(212) 998-6550

Robert R. Black
23 Broad Street
P.O. Box 643
Charleston, SC 29402
(803) 577-5806